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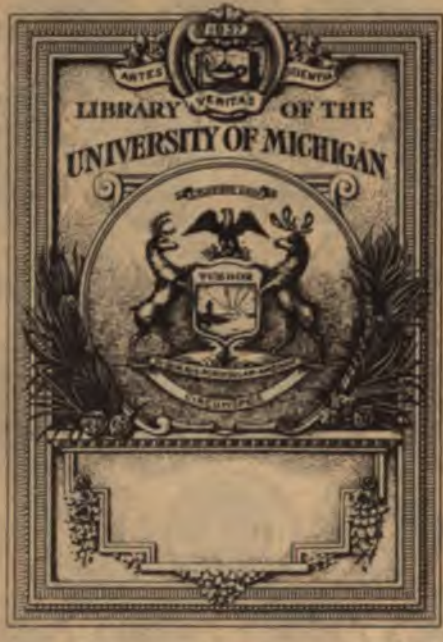

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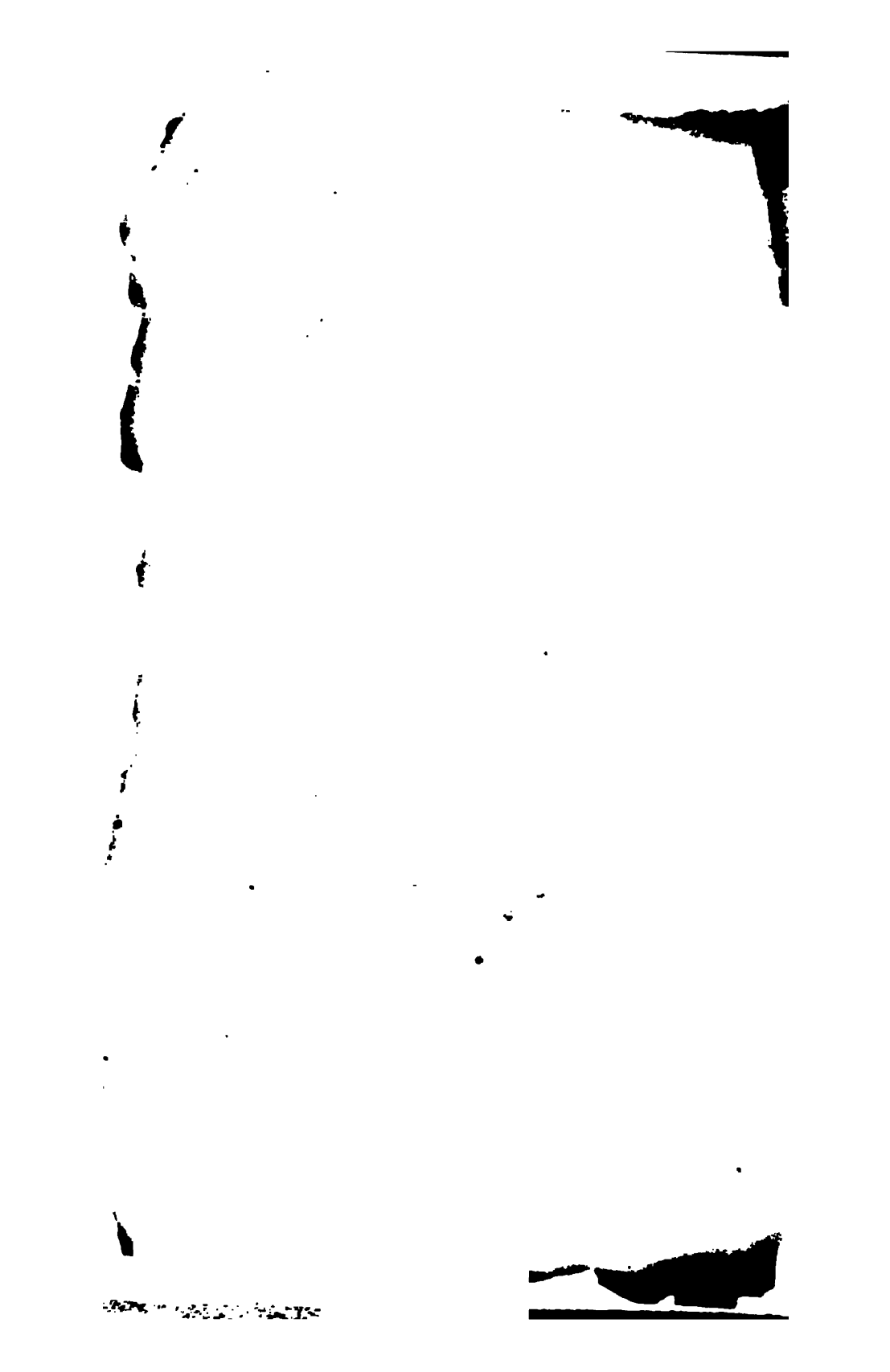

A

COMPENDIOUS VIEW

OF THE

CIVIL LAW,

AND OF

THE LAW OF THE ADMIRALTY,

BEING THE SUBSTANCE OF

A COURSE OF LECTURES

READ IN THE

UNIVERSITY OF DUBLIN,

BY

ARTHUR BROWNE, LL.D. S.F.T.C.D.

PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND
REPRESENTATIVE IN THREE PARLIAMENTS FOR THE SAME.

THE SECOND EDITION, WITH GREAT ADDITIONS.

VOL. II.

CONTAINING THE VIEW OF THE ADMIRALTY LAW.

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1802.

TO

THE RIGHT HONOURABLE

SIR WILLIAM SCOTT, KNT.

JUDGE OF THE HIGH COURT OF ADMIRALTY,

&c. &c. &c.

WHOSE SUPERIOR KNOWLEDGE

AND UNRIVALLED ADMINISTRATION

OF

THE CIVIL LAW,

AND

OF THE LAW OF NATIONS,

WHILE THEY REFLECT THE BRIGHTEST

LUSTRE ON THOSE SCIENCES,

PROVE, BEYOND ALL OTHER EXAMPLES,

THEIR GREAT UTILITY,

THIS WORK IS

MOST HUMBLY DEDICATED,

BY HIS

VERY OBEDIENT SERVANT,

THE AUTHOR.

Prof. Jesse S. Reeves
2-4-1930

PREFACE.

TO THE

SECOND VOLUME.

02-20-30 ARS

IT is a remarkable truth, that while theſe countries have been ſuper-eminently conſpicous in naval grandeur, power and importance, and the law which governs the courts of admiralty proportionably intereſting, no general elementary treatiſe upon that ſubject has appeared for more than a century. Thoſe of Exton, Zouch, and Godolphin, learned and able as they are, were compoſed while the conteſts between the courts of common law and admiralty were at their height, and the limits of the juriſdiction of the latter totally unſettled. To ſhew that they ſtill are not altogether ſettled by the rules of right reaſon, is one object of the preſent treatiſe; but

certainly many points have been aſcertained ſince the publication of the works above mentioned, and the extent to which the courts of law claim the right of iſſuing prohibitions is now pretty well known. The law of nations alſo, and its application to the modern controverſies of belligerent and neutral powers, is better underſtood; and though, upon ſome detached points, able and celebrated eſſays have appeared, yet every circumſtance of the times has called for ſyſtematic and general inſtruction. The confined limits of the preſent volume, as of the former, diſavow however and forbid the idea of detailed and minute information. They profeſs rather to guide reſearch, to refer where they do not inform, and to mark the great ſources of the law of the admiralty in the civil law.

If the author ſhould be deemed even leſs ſucceſsful in the attempt, the attempt has merit as prompting by example, and that ſo far the plan is uſeful can ſcarcely be denied. The work is of courſe, in ſome reſpects, a compilation; but the author has not ſervilely com-

piled, nor heſitated to intermix freely his own opinions and reflections; and while he means to ſpeak modeſtly, would not wiſh that feeling, as too often happens, to be miſtaken for timidity. The propriety of annexing this work to a treatiſe on the civil law is evident.

Since the work was finiſhed, the author has ſeen ſome new caſes, particularly the celebrated one of the *Gratitudine*, in December, 1801, and ſome new and able works on marine law; but he doth not think that theſe caſes have controverted his poſitions, nor theſe works anticipated his deſign, though of the latter he had at firſt that mortifying apprehenſion to which every man is ſubject, during the pendency of his labours.

ERRATA & OMISSA.

VOL. II.

PAGE 27, line 14, for *real* character read *royal.*

P. 38, line 5, dele *to.*

P. 48, laſt line but two, dele *a* before wreccum; and laſt line but one, for *take* read *make.*

P. 70, laſt line of the note, add *in the year* 1782.

P. 100, ſecond line, after *are* read *or ought to be.*

P. 134, laſt line but three, dele *that.*

P. 143, laſt line but one, read *ſide juſſores;* and note 38, for *refuting* read *refuſing.*

P. 186, line the ſixth, dele *for.*

P. 197, laſt line, for *verata* read *vexata.*

P. 200, line 19, before the word *benefited* dele *the.*

P. 237, line ſixth, dele the *ſemicolon*, and for *from* read *or.*

P. 254, note 16, for *twenty* hours read *twenty-four.*

P. 255, note 18, laſt line, for *Kierlighett* read *caſe of the Kierlighett*, 3 *Robinſon.*

P. 258, laſt line but ſix, for *ſometime* read *ſomething.*

P. 259, laſt line but two, for the words *in a diſtinct chapter* read *hereafter.*

P. 263, note 29, read *Vattel, book* 3.

P. 266, line ſecond, before *no* inſert the word *is.*

P. 267, note 38, for *piſcatories* read *piſcatoriis.*

P. 273, line 9, for *was charged* read *was and is charged.*

P. 286, tenth line, after the word *before* dele the *comma.*

P. 301, line 14, for *conſulatis* read *conſulatus.*

P. 345, line 15, after the words *this chapter* read *was written.*

P. 396, note 4, fifth line, for *this* read *ſtipula, the ſtraw of old delivered as token of conſent.*

ERRATA & OMISSA.

Page 400, line 8, for *in pain for* read *in pain of*.

P. 408, in the note, line 12, for *cauſes* read *cauſe*.

P. 413, in the 23d note, for *in another work on Eccleſiaſtical Laws* read *in the firſt volume*.

P. 414, line 11, after *lieu of it* inſert *iſſue is joined*.

P. 428 and 429, for *intervenent* read *intervenient*.

P. 435, ſecond line, for *it was* read *they were*.

P. 436, third line from the bottom, for *prudentibus* read *pendentibus*.

P. 441, line 12th, for *he remits* read *they remit*.

P. 445, for *into* read *in to*.

Ditto, for *ſealneſs* read *invoices*.

P. 449, line third from the bottom, after the word *delay* inſert a period (.)

P. 450, line ſeventh, after the word *ſane* inſert a period or full ſtop.

P. 451, laſt line, for the *ſemicolon* ſubſtitute a *full ſtop*.

P. 493, third line from the bottom, place the *comma* after *Blackſtone*, not after *alſo*.

P. 494, line 15th, after *produce* dele the *comma*.

P. 507, laſt line, after *facie* dele the *comma*.

P. 508, line fourth, for *eſſe* read *eſſe*.

Ditto, line 13, after the word *rules* dele the *comma*.

NOTE *accidentally omitted, p.* 200, *on* Perſonal Contracts.

What has been ſaid on the queſtion, whether perſonal contracts are, or rather ſhould be, cognizable in the admiralty, may ſeem involved in ſome confuſion. It may be neceſſary, therefore, thus to contract my opinion: It is, that perſonal contracts are held not to be cognizable in the admiralty—that they ought to be there cognizable—and that the doctrine which excludes them is accompanied by many at leaſt ſeeming contradictions in fact.

If it be aſked, how could perſonal contracts be ſued upon in the admiralty, ſince there is no proceſs iſſuable from that court againſt the perſon, ſave to oblige the execution of a ſtipulation? the anſwer is, 1ſt, that it will require, perhaps, ſome ſubtilty to render that poſition in practice univerſal, without abſurdity in theory; as e. g. in the caſe of ſuits againſt the captain, the ſhip being eloigned: 2dly, that if the poſition be uncontroverted, the queſtion recurs, viz. ſhould not in reaſon the law be altered? and 3dly, perſonal contracts may be ſued upon, without making the perſon liable to arreſt.

To illuſtrate the laſt poſition, it muſt be remembered, that though perſonal contracts were ſurely ſuable upon at Rome; yet when, in the fifth century of

the republic *, the *Addictio* was aboliſhed, execution could go only againſt the goods. Perſonal contracts were ſurely triable in France; yet there, without the conſent of the perſon, and his contracting that it ſhould be ſo, execution could not go againſt his body, but only againſt his property, and therefore it became neceſſary, in common juſtice, to paſs an act of parliament in England, to prevent French emigrants in England from being arreſted by French creditors for debts contracted in France.

* Servius Tullius forbade impriſonment in execution for debt. The Twelve Tables revived it, and it was again aboliſhed in the conſulſhip of Papirius Curſor, Even thus the evils ſuffered by the plebeian debtor not being fully remedied, Julius Cæſar introduced the *Ceſſio bonorum*, ſimilar to an inſolvent debtors' act.

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N. B. The Binder is desired to place the half title, "Law of the Admiralty," immediately before page 21 in this Volume.

INTRODUCTORY CHAPTER.

OF THE LAW OF NATIONS.

To treat of the law of nations may, on the firſt view, ſeem foreign to the duty of a profeſſor of civil law, the affinity of whoſe ſtudies might however plead his excuſe in an univerſity not endowed with a profeſſorſhip of the law of nature and nations. But his apology has been already made in a prælection, whoſe ſubject was the utility of the ſtudy of the civil law, marking, among other obſervations, the ſurpriſing degree in which the law of Rome had interwoven itſelf with the law of the world, and become the handmaid to its illuſtration.

In the execution of this plan, clearneſs and preciſion muſt be my principal objects, before which all attention to ſtudied phraſe and brilliant period, little congenial to tracts of the didactic kind, muſt neceſſarily bow.

On the very threſhold of this ſtructure, a queſtion may probably occur to juvenile enquiry, What means the law of nations? How can there be a law between independent ſtates? What is the obligation to it? Where its ſanction? Where the penalties of its violation? We have not in Europe, or in the world, a general amphictyonic council, the arbiter of ſtates, which may ultimately decide their appeals, and denounce the terrors of univerſal war on the children of diſobedience? The anſwer to this apparently formidable objection, is found in the reflection, that the law of nations is originally no more than the law of nature applied to nations (1). It has then the ſanction, the obligation, the immutability of the law of nature; it is properly a law with all its requiſites, characteriſtics, and concomitants. Why then is it diſtinguiſhed from the law of nature? Why rendered the ſubject of ſeparate conſideration, and ſeveral diſcuſſion?

In their reply to this latter queſtion, writers are by no means unanimous, and I ſhall venture, with all humility, to propoſe an opinion not perfectly coinciding with any I have found in books.

(1) Vattell therefore very juſtly entitles his book, The Law of Nations, or *Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns.*

The diſtinction was never made till the time of Ulpian, nor are the diſcriminations of the roman juriſts on this head accurate or uniform. Juſtinian defines the law of nature to be, *Quod natura omnia animalia docuit*, and the law of nations, *Quod naturalis ratio apud omnes homines conſtituit*; and though in the next paragraph the emperor has with more preciſion deſcribed *Jus Gentium* to be that *Quod omni humano generi commune eſt, nam uſu exigente & humanis neceſſitatibus, gentes humanæ jura quædam ſibi conſtituerint*, and inſtances the caſe of captivity founded in the right of war, and contrary to natural equality; yet it appears by the context, that his general view extended only to thoſe maxims of equity, which being founded in the nature of things are univerſally applicable to individuals of different countries, and not to the laws mutually obligatory upon integral national communities.

But, if the ancients diſtinguiſhed theſe laws imperfectly, the moderns did not, till of late, diſtinguiſh them at all. Hobbes, whoſe abilities at leaſt will not be denied, treats of the *Jus Gentium* merely as part of the law of nature; and the great Puffendorff has no where granted it a ſeparate diſcuſſion. Their method was founded in an opinion condemned as falſe by more recent writers, that the maxims of the law of nature applied to ſtates, were the ſame with its regulations applied to perſons, expreſsly averring that

the law of nature, when applied to nations, can ſuffer no neceſſary change; that the duties of ſtates and individuals are the ſame. Barbeyrack allows a variance, yet condemns diviſion of the ſubjects. It was reſerved for the baron de Wolfius, of Hall, a german philoſopher, (whoſe merits far exceed his fame, and whoſe voluminous works, though tinctured with the laborious prolixity characteriſtic of his nation, are replete with ſound learning, and the offspring of profound meditation) it was, I ſay, his glory, clearly to eſtabliſh the boundaries of theſe different codes. He firſt inſiſted, that the diverſity which takes place in the application of the law of nature to ſtates and individuals formed ſuch entirely different codes of duties and rights, as made it utterly improper to blend them in the ſame treatiſe, or apply to them ſimilar maxims. His diſciple Vattell (whoſe compendious work, by its clear conciſeneſs, is peculiarly adapted to common uſe) adopts the doctrine, and acknowledges the maſter; yet deviates in the mode of eſtabliſhing the foundations of national juriſprudence, deducing the idea from natural liberty and common intereſt, while Wolfius has recourſe to an imaginary univerſal republic.

Coinciding with them on the propriety of diſtinct conſideration, I muſt, with all humility, beg leave to differ as to the reaſons on which it is founded.

The law of nature, ſay they, is rightly in common parlance confined to individuals, their rights and obligations, becauſe the decrees of natural juriſprudence between ſtate and ſtate frequently vary from its injunctions between man and man, ſince a particular rule, perfectly juſt when applied to one ſubject, viz. an individual, may be totally improper in its application to a nation, a ſubject of a very different nature.

If theſe foreign juriſts mean to ſpeak of man in civil ſociety, it is true; but if of man in a ſtate of nature, which is neceſſary to their poſition, I find myſelf obliged to agree with our countryman Hobbes, that the law of nature, when applied to nations, can ſuffer no neceſſary change. I ſpeak here of the neceſſary law of nations, for as to the poſitive, that is not the law of nature, but the law of compact expreſſed or implied, and certainly may vary from the law of nature. Nor do I recollect an inſtance adduced by Wolfius or Vattell of ſuch diverſity. Both of them diſtinguiſh the imperfect from the perfect rights of nations, and determine the incompetency of one independent ſtate to preſcribe to another; the criminality of communities, their violations of the law of Heaven implanted in their hearts, are cognizable by no foreign tribunal and liable to no exterior ſanction, while injurious merely to themſelves and innoxious to their neighbours. And even though pernicious to ſur-

rounding powers, if merely offences againſt national equity, merely refuſals to attend to imperfect rights, they are not ſubjects of reſentment, reſtitution, or puniſhment. Denial of the offices of humanity, of corn, of ſtores, of ſupplies, calls not for vengeance on the uncomplying country, the ſole judge of its propriety, and arbiter of its neceſſity.

But do not all theſe principles apply to men in their private capacity?—do not imperfect rights, as well as perfect, appertain to individuals? Has any man in a ſtate of nature authority to enforce his imperfect rights by violence, or to controul the actions of another in no manner affecting his own? No foreign nation can juſtly interfere in the plans of municipal ſyſtem, nor individual ſtranger in the regulation of patriarchal dominion.

Again, they have taken much pains to explain the nature of national falſehood, as diſcriminated from hoſtile deception, and to ſubdiſtinguiſh juſtifiable deception from intolerable fraud.

The king, whoſe ſecretary, detected in perfidious correſpondence with the foe, was compelled to write diſpatches enſnaring the enemy to his ruin, has reaped applauſe; while the ſhip, which by holding out ſignals of diſtreſs inveigled the foe to his capture, has been juſtly reprobated, as

damping that charity which is ſacred to the intereſts of mankind.

The caſes cannot happen in civil ſociety, but ſurely in natural, if hoſtilities commenced between man and man, the ſame rules would qualify juſtifiable ſtratagem, and condemn unauthorized deception.

Theſe then are not the reaſons of claſſing the law of nations as a particular ſcience; the real cauſe in my judgment is, that *numberleſs caſes* ariſe *peculiar* to nations, and not incident to individuals, and therefore making a ſeparate ſcience and requiring a ſeveral diſcuſſion; not that the *ſame* caſes applied to both are regulated or decided in a different manner; and the neceſſity of diſtinction depends on the importance and variety of ſituations, confined and peculiar to great communities alone, and alſo upon the exiſtence of a voluntary or poſitive law among nations.

Having now ſhewn the grounds on which late writers found the diſtinction between the law of nature and nations, and thoſe on which it appears to me to reſt; method would lead me in regular order to delineate the various branches and diviſions of this law, and give a general and diſtinct chart of the immenſe dominions ſubject to its ſway. But let me pauſe a moment, to obviate an objection which probably has, by this time,

arreſted the mind of the auditor, eſpecially as in ſo doing, the advantage of example may rouſe the attention of the diſciple, and demonſtrate the utility of the ſcience. The objection is, to the magnified eulogiums of theoriſts on its importance, and their declamations on its difficulty.

If it be merely the law of nature, it may be ſaid, that law which reaſon and Providence have implanted in the human mind, the eye of conſcience will inſtantly diſcern the rays of juſtice, in whatever direction they are emitted. Behold the common topic of ſatire and ridicule, with the ignorant and unthinking, on thoſe whoſe peculiar province it is to develope truth in her ſanctuary. No! the majeſty of juſtice often ſits enthroned in a ſecret temple, acceſſible to few votaries. Reaſon is given to correct firſt impreſſions, but does not proffer the inſtant diſcovery of involved and perplexed propoſitions.

In the ſubject of our preſent conſideration, nothing can more fully ſhew the inherent difficulties, than the monſtrous abſurdities of many, even of its moſt illuſtrious profeſſors. Can there be a more extravagant idea to any man acquainted with the true foundations of government and ſucceſſion, than a teſtamentary right in princes to bequeath the ſceptre, however Elizabeth or Peter may have exerciſed the power *de facto?* Yet it has been juſtified and ſupported by the ableſt

writers, and amongſt others, by that very Wolfius of whom we have ſpoken. Can we conceive a more horrible principle, than the contradictory of that law of war, which prohibits poiſoned weapons, the infecting of ſprings, murder of an enemy by poiſon or aſſaſſination, the unneceſſary multiplication of the evils of war, or the adoption of acts deſtructive of human ſociety? We might have hoped that the authority of Grotius, the oracle of ſound policy and common ſenſe, would for ever have ſilenced the impious tongue that could propoſe ſuch horrors. We might have hoped, that the glory aſcribed by Tacitus to the Romans, *Non fraude, neque occultis, ſed palam & armatum, populum Romanum hoſtes ſuos ulciſci,* would have been envied by all poſterity. Yet ſuch doctrines are not altogether ſtrangers to the celebrated philoſopher of Hall; and the repreſentatives of an enlightened nation (2), at a very late period indeed, endured their mention without indignation or abhorrence.

The diſputes about *Mare clauſum & liberum,* engroſſed, in the laſt century, the attention of all Europe. They were occaſioned by the claim of the Engliſh to the dominion of the neighbouring ſeas, even as far as the oppoſite coaſts; a claim which could have been founded only in treaty,

(2) The French, whoſe rulers at one time took into conſideration the propriety of employing aſſaſſins,

and if it reſted merely on uſe, was ſupported ſolely by power; the licence of Britain was the ſole key to the navigation of thoſe ſeas; the claim was extravagant as it was haughty; the ſea, at leaſt out of cannon ſhot of the coaſts, is common to all: yet it was ſupported by the learned Selden, and required at that time confutation from the able pens of Grotius and Bynkerſhoek. I do not mean to impeach that dominion of the ſea, and reſpect demanded by the Britiſh flag, which particular treaties concede, or which the general conſent of european nations grants in the four ſeas to the undiſputed ſuperiority of the naval power of Britain.

Theſe are queſtions of obvious ſolution; but it would be eaſy to point out many others of more difficulty, on which the deciſions of this law might teach the ſtudent to tread more warily on ſimilar grounds, where youth is ſometimes tempted to plant a haſty and preſumptuous ſtep.

No queſtion has been more agitated than the right of ſearching neutral ſhips trading with the enemy. All Europe linked in the armed neutrality, on a late occaſion decreed againſt its exerciſe. They oppoſed power to the eſtabliſhed law of nature and nations. Every belligerent ſtate is warranted in ſtopping the materials of war, in their paſſage to the enemy, and in ſearching for contraband and enemy's property, and the only exiſting controverſy in the court of reaſon has

been, whether in any caſe compenſation ſhould be made for the goods detained, or their abſolute ſeizure, receive the ſtamp of general approbation.

May I be permitted, without appearing tedious, to mention an inſtance perhaps more familiar to the ſcholaſtic mind, the conduct of the Romans at the Caudine Fauces, becauſe though uſually condemned by the haſty obſerver, it has been differently adjudged by many learned writers?

The general, ſay they, covenanted without orders, and without power. The ſtate was not bound to ratify his promiſe. The Samnites never inſiſted that it was. No! they only urged, that the army ſhould be put again in the ſituation in which they ſtood when ſurrounded. The Roman general had promiſed his utmoſt exertions to obtain ratification from the ſupreme power. The Samnites accepted the chance of his ſucceeding, and releaſed the prey, to which their title could never be reſtored; all that the ſtate was bound to do, was to give up the unſucceſsful promiſers to the foe, an offer made, and peremptorily rejected. Such is the language of writers on public law, and ſuch the nature of all ſubaltern powers, according to them. See Grotius on the Samnite and Numantine Treaties, *de Jure B & P. Lib.* 2. ch. 15.

The obſervation is of the more conſequence, becauſe thoſe poſitions bear ſtrongly on a modern

queſtion, which has been not a little agitated (3). I do not here give my opinion; the inſtance is adduced to caution the dogmatical but unlearned decider on ſimilar queſtions, of the neceſſity of ſtudying this law.

The limits of the rights of the beſieged to deſtroy the ſuburbs of the town beſieged, or of the beſiegers to ruin its ſumptuous edifices—the treatment of ſpies—the caſe of ſubjects taken in arms, and particularly among enemies who ſurrender on terms—the power of the victor over the property of the vanquiſhed, occurring in every page of recorded time, demonſtrate the neceſſity of this knowledge to the writer, the admirer, and the ſtudent of hiſtory.

I ſhall detain your attention by barely mentioning two inſtances more, of a nature perhaps too delicate to be at preſent diſcuſſed in this place. What floods of abſurd argument have been poured forth on the queſtions, how far one ſtate has a right to interfere in the government of another, or to change its own conſtitution? Infinite are the ſhades and gradations, the exceptions and qualifications, which attend ſuch poſitions and enquiries; yet mankind ſeem to have forgot the adage, that error lies in generals, and to have ſuppoſed that no poſitions are true but thoſe that

(3) That reſpecting the articles of Limerick.

are univerſal. The principles which ought to guide, and determine us, in ſuch diſquiſitions, have been clearly, and I think juſtly laid down by writers on the law of nations, an attentive and honeſt peruſal of whoſe works might not only have ſilenced much of the wordy war on theſe ſubjects, but what is of infinitely more conſequence, have ſaved much human blood.

To diminiſh therefore theſe difficulties which occur to unenlightened reaſon, to mitigate the horrors of war, and preſerve the bleſſings of peace, their laws have been reduced by philoſophers to a ſyſtem, whoſe general method, order, and partition, it is now my buſineſs briefly to explain.

They firſt diſtinguiſh the internal law of conſcience, which is uſually called the *neceſſary* and *natural* law of nations, and which is always obligatory upon a nation with reſpect to its own duty, from the *poſitive* law of nations. This poſitive law conſiſts not only of that which has ariſen from cuſtom and convention, and therefore is or may be confined to particular ſtates, and depends upon their arbitrary volition; but alſo that external law, which dictates what every nation may require of every other, which law is independent of their mere volition, and yet being founded in the will as governed by reaſon, is uſually called the voluntary law of nations. They divide therefore the law of nations into the natural, or in-

ternal law of conſcience, and the poſitive; the poſitive again into the voluntary or external law, and the arbitrary, which conſiſts of the conventional and the cuſtomary.

Example will illuſtrate. War, founded on juſtice, is (according to the law of nature, which conſtitutes the neceſſary law of nations) a juſt method of acquiſition. War, founded on injuſtice, is not. But by the voluntary law, every war publicly declared with all due forms, is *conſidered* as juſt on both ſides, and accordingly amongſt nations, conqueſt is always allowed as lawful title, unleſs the conſequence of war unſolemn, as well as unjuſt (4).

The voluntary law, of which we have here ſpoken, muſt be carefully diſtinguiſhed from the conventional and the cuſtomary; it is *univerſal*, and *founded in nature* as well as the neceſſary, and therefore is plainly diſtinguiſhed from that law which ariſes from compact expreſſed or implied. It muſt alſo be diſtinguiſhed from the neceſſary law, becauſe it is the external, as that

(4) This does not contradict my opinion, that the law of nature applied to nations, ſuffers no change; it is not here applied; but a poſitive law founded on implied compact *(that compact made by reaſon indeed, but no part of the immediate law of nature)* is ſubſtituted, and it is in this ſenſe that Grotius ſays, *Jure gentium vetari multa ſolent, quæ jus naturæ permittit*, and the converſe.

is the internal law of nations. The neceſſary is a ſacred law, obligatory in conſcience on all nations, in the regulation of their internal conduct. The other is a rule which their welfare and common ſafety obliges them to follow in mutual intercourſe. The thing therefore forbidden by the natural may be tolerated by the voluntary, becauſe its puniſhment may be inconſiſtent with general liberty and reciprocal independence; but we muſt not thence deduce its rectitude or juſtice. The general principles of national juriſprudence oblige us often to leave the offending nation to the chaſtiſement of conſcience, and the diſpenſations of Providence. That people is forbidden by the natural law of nations to do wrong, but puniſhment is wreſted from our hands by the voluntary. The neceſſary law then immediately proceeds from nature, the voluntary mediately, nature recommending a deviation from her ordinary principles, on account of the relative ſtate of nations, and their mutual advantage.

The following examples will illuſtrate the nature of theſe ſeveral laws:

That ſhips ſhould be received with humanity when in diſtreſs, and aſſiſted when ſhipwrecked, are dictates of the *neceſſary* law of nations.

The interdict to nations againſt interfering with the internal regulations of another's government or conſtitution, however unjuſt they may be, or

contrary to the natural and neceſſary law, is an inſtance of the *voluntary.*

All treaties are inſtances of the *conventional*; the right of ſending embaſſadors, the reſpect ſhewn to flags of truce, the abſtaining from putting priſoners to death, of the *cuſtomary* (5).

The voluntary proceeds from the *preſumed* conſent of nations; the conventional from the *expreſs*; the cuſtomary from the *tacit* conſent; and the three together form the *poſitive* law of nations.

The voluntary is univerſal: the cuſtomary may or may not be ſo: the conventional ſcarcely can.

The cuſtomary and conventional may or may not be declaratory of the neceſſary and natural law of nations, or conſonant to it; but if repugnant to it, are unjuſtifiable, for that is immutable.

Such are the diſtinctions which writers have thought neceſſary in treating of this law; the limits of a prælection will not ſuffer more minute detail. Still it may be aſked (it is the laſt objection I ſhall conſider in this exhortation to the ſtudy of a moſt uſeful and noble ſcience) to what purpoſe theſe theories and theſe ſyſtems? In prac-

(5) This Mr. Ward calls the conventional; it is but a difference in terms. I follow Vattell.

tice behold them neglected, deſpiſed by ſtateſmen, contemned by politicians. Let the objector recollect, that he makes practice the criterion of right, or denies its diſtinction from wrong: is there then no difference between right and wrong, between truth and falſehood, between juſtice and iniquity? Can the æthereal form of heavenly virtue be ſtained by the pollution of man, or its immutable eſſence change with the fickle villainy of the human heart? Forbid it Heaven! ſuch opinions can never enter theſe walls; within this ſanctuary refutation were idle. On the foundations of obligation we may differ, on its exiſtence every heart will unite.

Let the diſciples of Machiavel deſpiſe the law of nature. Let their doctrines boaſt a little temporary ſucceſs or individual elevation. Providence does not deſcend to our minute ſpan. Political villainy may proſper for a ſingle life, or mould the fortunes of a particular man; but where is the nation which has proſpered by deſpiſing the laws of Heaven. The life of nations is the period of philoſophic obſervation. Their duration, and their felicity, the criterions to diſtinguiſh found policy from tricking iniquity; to the tribunal of hiſtory I appeal, and time and fate ſhall be the judges. Who ſhall ſay for how many centuries falſe policy and miſtaken cunning, in their day admired and called wiſdom, have been generating the ſtorm which now agitates

Europe, or how remote the fathers, whoſe ſins are now viſited upon their children (6).

But great is our error, if we ſuppoſe that the law of nations has no influence on the wicked; it checks where it does not guide. No prince, no potentate, dare refuſe an apparent allegiance to its ſway. In the imagination of the poet alone has exiſted the bravo who anounces, all this I do becauſe I can. The manifeſtoes of belligerent powers are ſo many acknowledgments of its dominion. Nor are they merely obeiſances to the ſtar of virtue; the diſpoſition of nations tends to puniſh the violators of their common law; that diſpoſition will often controul the intrigues of courts, and the confederate artifice of mutually corrupting ſtates. Nor are miniſters always ſo wicked as to require impelling force from the public will. It were a cruel ſentence on governors, which decreed them neceſſarily flagitious, or ſuppoſed the infuſion of authority a poiſon to all the bland materials of the human heart. Many have been the ſalutary rulers, who were ſons of rectitude, not ſervants of fear, and the doctrine that power and honeſty are incompatible, checks every ſeed of confidence, and with eternal langour blaſts the thus uncheriſhed propenſity to good, which the Deity placed in the rudiments of our conſtitution.

(6) This was written before the concluſion of the war.

Let us watch the progreſs of juſt and unjuſt wars. Some of us in the courſe of no long life have had opportunities. The enthuſiaſm, the ſpirit, the united force of the nation in the former is irreſiſtible. The voice of faction is dumb; the conteſt for power ceaſes; murmur ſcarce whiſpers in her dark cave; oppoſition is impotent. In the latter, with languid and deſponding effort, the nation acts with but half its ſtrength, while the other moiety in the violent ebb of popular opinion, revolves back on the iſſuing tide. Let us admire the truth, and acknowledge there is a law in our hearts, reſiſtleſs, and incontroulable.

Is the knowledge of juſtice uſeleſs, becauſe men will not always be perfectly juſt. Men, though not perfectly juſt, will be leſs unjuſt, knowing this law; men will do wrong, but he would be a ſtrange logician who inferred, there is therefore no uſe in knowing the difference between right and wrong. What is the uſe of all moral education? Men are more virtuous by being taught what is right, nor is it poſſible that the human mind can be long expoſed to the luminary of reaſon, without being whitened by its rays; while then the unalterable bonds of right and wrong ſhall exiſt; until the adamantine walls which ſeparate the infernal regions of fraud and iniquity from the bliſsful ſeats of light and Heaven, ſhall be pulled down; ſo long as chaos and confuſion dwell on the borders of Hell, and helliſh deeds; while national treachery ſhall de-

ſtroy reciprocal confidence, and the fangs of national injuſtice be the ſeeds of armed myriads againſt itſelf; while there be any virtue, while there be any praiſe, ſo long ſhall the law of nations tower in the rank of dignified ſcience, and its diſciples meet their reward.

LAW OF THE ADMIRALTY.

The author begs that he may not be accuſed of plagariſm, if on controverted queſtions he has adopted the very words of Lord Mansfield, and Sir William Scott, even at conſiderable length. Where can the reader tread ſo ſafely as in the footſteps of thoſe moſt celebrated men, to vary from whoſe very modes of expreſſion, when they can be had, would be miſerable affectation of novelty, with total diſregard of utility?

CHAPTER I.

ON THE ANTIQUITY OF THE ADMIRALTY, AND OF ITS COURTS.

THE diſquiſitions on this ſubject, though rather curious than uſeful, have ſo much engaged the attention of great and able men, that to paſs them over in ſilence might argue diſreſpect for their labours, or inattention to their fame. Godolphin and Exton (1) particularly have proved their learned reſearch in tracing the derivation of the name, and by quotations proving the exiſtence of this authority among the ancients, as alſo its early eſtabliſhment in modern Europe, but eſpecially in Britain, the queen of iſles and ſovereign of the ſea.

Many languages have been ſearched for the derivation of the celebrated word admiral, or ammiral (2): ſome derive it from the greek

(1) Godolphin was judge of the admiralty about the middle of the ſeventeenth century; the Extons after him, of whom there were two, John and ſir Thomas.

(2) By our old authors, the word is uſually written ammiral; and in old additions of Milton I think it is ſo ſpelt:

" As when the maſt of ſome tall ammiral."

αλμυρος ſalſus, becauſe his juriſdiction extends over the ſalt ſeas Others from the ſaxon *aen mere eal*; that is, over all the ſea: and others again, whoſe opinion Godolphin approves, partly from the greek, partly from the arabick; *amir*, or *emir*, in arabic, ſignifying præfectus; and αλιος, in the greek language, *marinus*, both which amount to admiralius, or rather ammiralius. Certain it is, that in the eaſt, the appellation was alſo given to terrene princes and commanders: thus the ſultan, or tyrant of Babylon, frequently mentioned in their tranſactions, was alſo and commonly called admiral (3).

We might ſuppoſe that it required no great learning to prove that a fleet muſt have a commander, and a navy a ſuperintending or regulating power. Yet the early writers on admiralty juriſdiction, and propugners of its authority againſt the encroachments of the common law, have ranſacked ancient and modern lore to ſhew that the admiral's authority has exiſted in almoſt every civilized nation, though under various names. The thalaſſiarchus of the Greeks, the præfectus claſſis of the Romans, and the dungarius of Conſtantinople, are vouched in aid of a poſition which required neither argument nor example, where the power was in any degree naval, or the country maritime; and the title of

(3) The mention of the admiral of Babylon is not unfrequent in the old romance, particularly in archbiſhop Turpin's famous chronicle.

admiral is beſtowed by theſe writers as familiarly upon the Carthaginian Hanno, and Hamilco, as upon our own naval commanders.

It is a matter of more curioſity to trace the origin of this office in England and in France, becauſe we thus alſo nearly fix the period when they began to be maritime powers, ſince the exiſtence of the office muſt of neceſſity ſpeedily follow the exiſtence of a navy. Now it appears by the authority of John Tillius, a clerk of the parliament of Paris, who wrote *De Rebus Gallicis*, that the kingdom of France having been leſſened by inteſtine diviſions, and its kings reduced to narrow dominions by their potent vaſſals, ſuch as the dukes of Normandy and Bretagne, and the earls of Flanders, Provence, and Languedoc, and having for a long time no command of the ſea, it had conſequently no occaſion for admirals; and therefore, according to this author the firſt admiral of France was *Americus*, or *Amaurius*, viſcount of Narbonne (4), ſo conſtituted in king John's reign, about the year 1360. And though ſome pretend that there was an admiral even in the days of king Pepin, yet thoſe who pay any attention to probability, do not pretend that Amaurius had any predeceſſor except *Enguarantus Dom de Cauſy*, about twenty years before, in the reign of Philip the Bold; at leaſt not as admiral of all France, for it is ſaid that

(4) See the book called *Laws of the Sea*, p. 54.

there were at one time two, at another time three admirals in France, dividing their juriſdiction according to the coaſts of their ſeveral provinces reſpectively. This high office, lord ammeral, in point of dignity, was next to that of the high conſtable of France (5).

The writers on the antiquity of the engliſh maritime power, and its ſovereignty of the ſea, inſiſt, apparently with truth, and in conſonance with the natural progreſs of events in the hiſtory of the two nations, that the office of admiral was of much earlier date; and Exton and Godolphin, not content with ſir Henry Spelman's judgment (who was of opinion that this high officer was not known in England by that name or ſtile until the beginning of the reign of Edward the firſt, *i. e.* about the year 1272 (6), though the office was known long before) inſiſt that both name and office were known at a much earlier period.

They ſay, that by an ordinance of king John made at Haſtings, touching the ſovereignty of the britiſh ſea in the point of ſtriking ſail, or veiling bonnets by the veſſels of foreign nations to the king's ſhips, mention is made of the lord

(5) See Godolphin, p. 21.

(6) This bears a ſtriking propinquity to the time when Cauſy was appointed admiral of France; and when we look into hiſtory and ſee that about this time the ſeas were extravagantly infeſted by pirates, which produced a war between England and France, we ſhall ſuſpect a ſimilarity of cauſes.

high admiral of England; and that by an ancient record in the Tower of London, entitled, *De ſuperioritate maris Angliæ, & Jure Officii Admirallitatus in eodem*, it appears that the Admiralty of England, and the juriſdiction thereof, was far more ancient than Edward the firſt; and from age to age ſucceſſively, and time out of mind: and this they confirm by many other authorities.

Whatever may be the truth as to the name, the office was certainly known and uſed in England before the reign of Edward the firſt; and therefore when an eminent writer ſays (7) there was no ſuch office till his reign, he muſt mean, not known by that name; for my lord Coke ſays (8), the admiral, and court of admiralty, were time out of mind; though he was at firſt called *capitaneus maris*, and by other names (9).

In the latter part of the reign of Edward I. and during the whole reign of Edward II. Edward III. and Richard II. there appear for the

(7) Mr. Reeves, Vol. III. p. 197. William de Leiburn is ſtiled, 15 Edward I. *admiraltus maris Angliæ:* it is extraordinary that Spelman ſhould ſay in his gloſſary, that Richard Fitzallan, in the reign of Richard II. was the firſt admiral of all England.

(8) Coke, L. 260.

(9) Thomas de Moleton, 48 Henry III. was conſtituted capitaneus maris. See the Catalogue of Admirals in the Laws of the Sea, and conſult Godolphin, Exton, and Zouch.

moſt part to have been two, and ſometimes three admirals, ſtiled of the north, weſt, and ſouth. When the ſouth coaſt, as ſometimes was the caſe, was ſuppoſed to be comprehended in the weſt, there were only two. There is only one perſon, during the period aforeſaid, who is ſtiled admiral of England, which is Richard Fitzallan, earl of Arundel, which probably is the reaſon that Spelman ſays he was the firſt admiral of all England; but William de Liburne, 15 Edward I. is called admiral of the ſea of England, and had no partner in authority, though the office was ſoon after divided. The authority depended on the commiſſion, and was ſometimes for life, ſometimes during pleaſure.

In the reign of Henry IV. we find ſeveral perſons ſtiled admirals of England; and in the reign of Henry VI. theſe great officers began to be ſtiled admirals of England, Ireland, and Acquitain.

This is the title moſt frequently annexed to ſucceeding admirals down to the reign of Charles II. though ſometimes the names of Wales, Calais, &c. &c. are added. James, duke of York, is the firſt who is ſtiled admiral of England, Scotland, and Ireland.

When the duke of York, afterwards James II. was excluded from office by the teſt act, in 1673, the king declared, that he was determined not to confer it upon any other perſon for the preſent, but to have the ſame executed by

commiſſioners (10), which was done accordingly; and to them was granted full power and authority to do, exerciſe, execute, and perform, all and every the powers, authorities, juriſdictions, acts, matters and things, which to the office of lord high admiral do appertain. There have ſince been two lord high admirals, the earl of Pembroke, in the reign of prince William; and king George of Denmark, in that of queen Anne; but from the acceſſion of the houſe of Hanover, the office has always been in commiſſioners.

The king therefore alone now holds the office of lord high admiral, but in a capacity diſtinguiſhable from his real character; he repreſents that great officer, though in more modern times we do not uſually ſpeak of the lord high admiral, but of the king in his office of admiralty (11). The diſtinct capacity in which he holds this power, will be more viſible hereafter when we come to ſpeak of prize and prize droits, there being a moſt material diſtinction between thoſe things which come to him jure coronæ, and thoſe which come to him in his office of admiralty, a captor having no claim under the king's uſual proclamation to any ſhare in the latter.

The prodigious perquiſites which had been granted by patent to the lord high admiral, or

(10) See ſir L. Jenkins' Letters, p. 705. 2d vol.

(11) See 1ſt Robinſon's Reports, p. 81. and 229.

veſted in him by immemorial uſage, of courſe do not paſs to the commiſſioners, and are reſerved for his majeſty's uſe by the expreſs words of their commiſſion. Notwithſtanding the extenſive words uſed in their commiſſion, great doubts (12) aroſe with reſpect to their juriſdiction, to quiet which, in the ſecond year of the reign of William and Mary, an act was paſſed by which it was declared that all juriſdictions and powers, which by act of parliament or otherwiſe are inveſted in the lord high admiral of England, have always appertained to commiſſioners of the admiralty, as if they were lord high admiral; in imitation of another act, 20 Car. 2. cap. 4. which provided for the powers of the lords commiſſioners of the treaſury, when the place of lord high treaſurer is vacant.

The court of admiralty is held before the lord high admiral, or his deputy, who is called judge of the court; when there was a lord high admiral, the judge of the admiralty held his place moſt commonly by patent from him (13), and was called his lieutenant, as the vice-admirals of the ſeveral diſtricts were called deputies. The judge now holds his place by direct com-

(12) See theſe doubts exemplified on the queſtion, Whether a commiſſion of oyer and terminer could be directed to them, a ſtatute of Henry VIII. ſaying, it muſt be to the lord high admiral. Sir L. Jenkins, 2d vol. p. 705.

(13) Sir L. Jenkins, vol. II. p. 706.

miſſions (14) from the crown, under the great ſeal; to him appeals lie from the vice-admiralty courts in the Weſt Indies, and other plantations and ſettlements; and that on revenue cauſes as well as others, which had been doubted (15), and the privy council alleged to be the only proper court of appeal.

The court of admiralty is twofold; the *inſtance* court, which takes cognizance of contracts made, and injuries committed upon the high ſeas; and the *prize* court, which has juriſdiction over prizes taken in time of war. The commiſſions to hold theſe courts are perfectly diſtinct, though uſually given to one perſon. Their reſpective juriſdictions and authorities will be hereafter diſcuſſed in appropriate chapters.

The inſtance court is governed by the civil law, the laws of Oleron, and the cuſtoms of the admiralty, modified by ſtatute law.

The prize court is to hear and determine according to the courſe of the admiralty and the law of nations.

From the inſtance court an appeal lies to the king in chancery, who appoints delegates by

(14) When the duke of york ceaſed to be admiral, ſir Leoline got his commiſſion from the crown. He gives us theſe material words of it. "Te locum tenentem noſ-"trum in dicta curia admiralitatis Angliæ & officialem "principalem, comiſſariumque generalem & ſpecialem, ac "antedictæ ſupremæ curiæ admiralitatis Angliæ præſiden-"tem & judicem, ordinamus, facimus," &c. &c.

(15) See 2d Robinſon's Reports, p. 248.

commiſſion to hear and determine it. From the prize court, the appeal is to certain commiſſioners of appeal conſiſting chiefly of the privy council.

In *Scotland*, the juriſdiction of the admiral in maritime cauſes was of old concurrent with that of the ſeſſion. The high admiral is declared the king's juſtice general upon the ſeas; on freſh water within flood and mark, and in all harbours and creeks. His civil juriſdiction extends to all maritime cauſes, and ſo is ſaid to comprehend queſtions of charter-parties, freights, ſalvages, bottomries, &c. He exerciſes this ſupreme juriſdiction by a delegate, the judge of the high court of admiralty; and he may alſo name inferior deputies, whoſe juriſdiction is limited to particular diſtricts, and whoſe ſentences are ſubject to the review of the high court. In cauſes which are declared to fall under the admiral's cognizance, his juriſdiction is ſole, inſomuch that the ſeſſion itſelf, though it may review his decrees by ſuſpenſion or reduction, cannot carry a maritime queſtion from him by advocation. From the Lords of ſeſſion the appeal now lies to the Houſe of Lords.

The admiral of Scotland has acquired, by uſage, juriſdiction in mercantile cauſes, even where they are not ſtrictly maritime, cumulative with that of the judge-ordinary.

By the nineteenth article of the union with Scotland, all admiralty juriſdictions ſhall be under the lord admiral, or commiſſioners of admiralty in Great Britain.

But the court of admiralty now in Scotland ſhall be continued, and all reviews, reductions, or ſuſpenſions of ſentences in maritime cauſes, till the parliament of Great Britain make regulations as expedient for the whole united kingdom, ſo as in Scotland be always a court of admiralty for determining all maritime cauſes relating to private right in Scotland.

And the heritable rights of admiralty and vice-admiralty in Scotland, ſhall be reſerved to the proprietors as rights of property, ſubject in the manner of exerciſing to the regulations of parliament (16).

In Ireland it doth not appear that there ever was a lord high admiral diſtinct from that of England. Spelman and others mention, that when the office in England was tripartite, about 20 Edward I. a certain Iriſh knight, whoſe name is not mentioned, was admiral of the weſt, and the parts thereof, but not particularly or excluſively of Ireland. Ireland, as we have obſerved, was uſually ſpecified and included in the com-

(16) An intereſting queſtion is diſcuſſed in the Letters of Sir Lionel Jenkins, which aroſe between the two kingdoms of England and Scotland before the union, with reſpect to the power of the engliſh court of admiralty to touch a ſentence of the ſcottiſh court evidently null, for want of calling all perſons intereſted, where the ſhip condemned was afterwards found in England, and on the queſtion whether the party injured was obliged to ſeek redreſs in Scotland by way of appeal, Sir L. J. 2d vol. 761.

miſſion to the lord high admiral of England.

There has been in Ireland, from time immemorial, an inſtance court of admiralty. It is mentioned, and the mention is worthy of note, more than once in the letters of ſir Leoline Jenkins, and a new method of appeal from it at that time propoſed, was probably by him prevented, and certainly juſtly condemned. This court was put upon a new footing in the year 1782, by an act which is given in the appendix. Of late years no prize commiſſion has been given to the judge of the admiralty in Ireland, though he appears conſtantly to have poſſeſſed ſuch an authority, while it was a vice-admiralty court, *i. e.* till the year 1782.

By the articles of union between England and Ireland, it is provided in the eighth article, that there ſhall remain in Ireland an inſtance court of admiralty for the determination of cauſes *civil and maritime only*; and that the appeal from ſentences of the ſaid court ſhall be to his majeſty's delegates in his court of chancery, in that part of the united kingdom called Ireland.

Beſides the inſtance and prize courts, there is a criminal juriſdiction in the lord high admiral over all crimes and offences committed on the ſea, or on the coaſts out of the body of any county, and of death or mayhem in great ſhips, being or hovering in the main ſtream of great rivers below the bridges of the ſame rivers. But

theſe offences are now by ſtatute 28 Henry VIII. ch. 15. tried by commiſſioners of oyer and terminer, under the king's great ſeal; and this is at preſent the only method of trying marine felonies in the court of admiralty; the judge of the admiralty ſtill preſiding therein.

The courts of vice-admiralty will be ſpoken of hereafter in a ſeparate chapter.

CHAPTER II.

ON THE ADMIRALTY LAW IN GENERAL.

IT is my purpoſe in this chapter briefly to analyſe the component parts of admiralty law, reſerving its regulations until we treat of the particular ſubjects to which they apply.

The law by which the proceedings of the court of admiralty are governed, is compoſed of thoſe parts of the civil law which treat of maritime affairs (as far as the deciſions of the Roman code upon thoſe ſubjects have with us been deemed equitable), blended with other maritime laws; the whole corrected, altered, and amended, by acts of parliament and common uſage.

The maritime law of Rome was not the natural production of that military ſtate; nor doth it, in the legal inſtitutions of a nation ſo little addicted to commerce, occupy any conſiderable ſpace. The lex Aquilia—the laws de nautico fœnore—the law Rhodia de Jactu—that de nautis, cauponi-

bus, &c.—De exercitoria actione—De Incendio, naufragio, &c.—De navicularíis—De navibus non excuſandis—De Naufragiis (1)—comprehend almoſt all which they have delivered to us on the ſubject. Peckins, as edited by Vinnius, is the beſt guide to our knowledge of their naval ideas.

The ſubſtance of theſe laws, as far as they can be intereſting to us, may eaſily be given. They make the exercitor or owner anſwerable for the contracts of the maſter, and it is ſaid they alſo make the ſhip liable for the ſame. They certainly do, inaſmuch as the res or ſhip might be arreſted by proceſs till bail was given: but I do not find any ſuch caſe among the tacita pignora of the Romans, though repairs of a ſhip might, like all other repairs, conſtitute a tacit pledge. They make the owner liable for the offences of the ſailors, but not for their contracts. The owner was not liable for contracts of the maſter exceeding his authority: he was liable, therefore, for the wages of the ſailors, or money laid out and lent for the repair of the ſhip; but not if the maſter contracted to hire out the ſhip, when he was only authoriſed to convey the merchandize on board her. The creditor might ſue

(1) Theſe laws are found in the Pandects and Code reſpectively as follow:—Lib. 14. tit. 2.—Lib. 4. tit. 9.—Lib. 14. tit. 1.—Lib. 47. tit. 9. of the Pandects, and of the Code.—Lib. 11. tit. 1.—and ſame lib. 11. tit. 5.

either maſter or owner, and, if there were part-owners, each of them for his whole debt (2).

The laws on average and contribution do not materially differ from thoſe of modern days, and have ſerved as models for them.

The laws of marine intereſt declare that the riſk of the lender on the credit of ſhip or cargo, ſhall commence from the ſailing of the ſhip: that extraordinary intereſt for the riſk, *ſi modo in aleæ ſpeciem non cadat*, if not on a gambling contract, ſhall be allowed; and that even ſhipwreck ſhall not excuſe the borrower, unleſs he expreſsly ſtipulates that the money ſhall not be paid until the ſhip reaches its deſtined port.

The Aquilian law, as conſtrued and extended by equitable conſtruction to all damage done to the property of another by irrational agents, is very general indeed. That part which relates to ſhips, or which is founded upon it, provides, that if a ſhip be run down by another through the fault of the crew, its whole value ſhall be paid; if by accident, nothing; and the fault, when it is ſuch, ſometimes falls on the ſailors, ſometimes on the owner.

The exercitor was anſwerable for all the merchandize and effects carried in his ſhip, even to a

(2) Theſe regulations are contained in the law in the 14th book of the Pandects, on actions againſt owners, De Exercitoria Actione. Thoſe on average and contribution in the celebrated Rhodian law de Jactu.

paſſenger carried gratis, and whether the damage happened by the fault of a ſailor or a paſſenger; but not if it was occaſioned by ſhipwreck or pirates, or any other of the cauſes which the civil law included under the name of major vis (3).

Plundering a veſſel ſhipwrecked was by the Prætor's edicts puniſhed by compelling payment of fourfold the value; by Antoninus, in freemen, by the baſtinado and baniſhment for three years; in ſlaves, by ſcourging, and condemnation to the mines (4).

No ſhip was to be exempted from the public ſervices of the ſtate (5).

The emperor Conſtantine thus nobly expreſſes his rejection of any claim of imperial prerogative over ſhipwrecked effects: "Si quando naufragio "navis expulſa fuerit ad littus, vel ſi quando ali- "quam terram attigerit, ad dominos pertineat; "fiſcus meus ſeſe non interponat. Quod enim "jus habet fiſcus in aliena calamitate ut de re "tam luctuoſa compendium ſectetur (6)."

"If a ſhipwrecked veſſel be caſt on ſhore, or "reach any land, let the owners have her, and the "exchequer put in no claim. What property has "the treaſury in calamity? Shall the revenue pro- "fit by miſery?"

(3) See the law in the 4th book of the Pandects, De Nautis, &c. ut Recepta Reſtituant.

(4) Dig. 47. 9. De Naufragio, &c.

(5) 11th lib. Code, cap. 1.—(6) 11th lib. Code, cap. 5.

The holding out falſe lights, a cuſtom there ſaid to be frequent with fiſhermen to occaſion ſhipwreck, is dreadfully puniſhed.

Sterile, then, is the naval law of Rome. But to the inhabitants of the little iſland of Rhodes, driven by their neceſſities to cultivate navigation, and empowered by their ſituation to do ſo with ſucceſs, are eſteemed the authors of the earlieſt ſea-laws of which any traces now exiſt. From them the Romans are ſuppoſed to have borrowed all their marine regulations; a poſition, however, by no means generally admitted. It reſts principally on the celebrated paſſage in the Pandects, in which Antoninus replies to the petition of the ſhipwrecked Eudemon (7). But there are not ſo many words in this anſwer as there have been controverſies and opinions on its meaning: it employed the pen of Selden, and the great

(7) See the Pandects, lib. 14. tit. 8. and Bynkerſhoek de lege Rhodia. The words in the Pandects are:—"De-precatio Eudæmonis Nicomedienſis ad Antoninum Imperatorem. Domine Imperator Antonine, naufragium in Italia facientes direpti ſumus a publicanis Cycladas inſulas habitantibus. Reſpondit Antoninus Eudæmoni: Ego quidem mundi dominus, lex autem maris, lege id Rhodia quæ de rebus nauticis præſcripta eſt, judicetur, quatenus nulla noſtrarum legum adverſetur." The Greek original ſeems to me, however, to confirm the common opinion; nor do I underſtand why, in ΟΑΕ νομος της θαλασσης τω νομω των ροδιων Κρινεσθω, the words τω νομω are tranſlated *lege id*, and not *lege illa*.

authority of Bynkerſhoek is exerted with much labour and ingenuity to ſhew, that probably the emperor's reſponſe applied only to the particular caſe, while he aſks triumphantly, "How doth it "happen that, in the great body of the civil law, "we find only one ſolitary chapter, that de Jactu, "taken from the Rhodian law?" It ſeems to be agreed, that the ſterile and confuſed little heap (8) publiſhed by Leunclavius and others as a body of Rhodian laws, is a mere forgery of later times, unworthy of notice, and inapplicable to uſe. Yet Exton hath laboured to ſhew that the rhodian ſea-laws were ſettled here long before the laws of Oleron.

The other ancient maritime laws, moſt particularly worthy of notice, are thoſe of Oleron, of Wiſbuy, and of the Hans Towns (9). The laws of Oleron were certain regulations of maritime affairs, eſtabliſhed by our king Richard I. during his ſtay at the iſland of Oleron, on the coaſt of Guyenne in France, on his return from the Holy Land; though ſome aſcribe much of the merit to his mother, Elinor ducheſs of Guyenne,

(8) "Inconditam farraginem de rebus nauticis," ſays Balduinus, "de lege Rhodia;" and Bynkerſhoek re-echoes his words.

(9) They have all been collected and publiſhed, together with a ſummary of the French marine ordinances, in a treatiſe entitled, The Laws of the Sea, publiſhed early in the eighteenth century.

who had previouſly cauſed a marine ſyſtem to be drawn up, called the Roll of Oleron. They were continued in the time of king John, and certain ordinances added to them, as appears by the Articles of Enquiry tranſlated into Latin by Maſter Roughton: they were promulgated anew in the 50th of Henry III. and received their ultimate confirmation in the 12th of Edward III.

The fame and hiſtory of the Hans Towns are too well known to allow any ſurprize at their being the framers of a naval code; but that Wiſbuy, a town in the now obſcure iſland of Gothland, in the Baltic, ſhould have once been the queen of commerce, is more ſurprizing; and it requires our recurrence to the hiſtory of the north, in centuries long ſince paſt, to account for the ſubmiſſion which Europe paid to her laws. Theſe, with the ordinances of Antwerp, Stockholm, and other great ports of trade, as far as they have been received with us by uſage, and are not contrary to the laws of our land, form as it were the common or fundamental law by which the admiralty proceeds and is governed: for it is an extraordinary truth, that the greateſt naval power that ever exiſted, that of Britain, has no cemented naval code publiſhed by authority, ſuch as France has collected together in one great ordinance; and to determine its will upon maritime ſubjects, we muſt conſult its practice to know how far the maritime laws of ancient Europe have been here received, unleſs where acts of parliament

upon ſingle and detached ſubjects have aſcertained the law; and hence the great neceſſity of ſuch treatiſes as the preſent.

We muſt not forget, among works of authority, the Guidon and the Conſolato del Mare, two celebrated compilations. The latter, particularly, has been termed, by a moſt reſpectable writer, a venerable pile of maritime and commercial law, whoſe origin is of ſuch remote antiquity, and rooted ſo deeply in the annals of time, that no one can tell with certainty at what period it was compoſed. It was certainly approved and adopted as their maritime law in the twelfth and thirteenth centuries by the free ſtates of Italy, which, with ſome cities of Spain, then poſſeſſed almoſt excluſively the maritime commerce of the ſouth of Europe, as the Hans Towns did of the north. It contains the conſtitutions of the greek and german emperors; of the kings of France, Syria, and Cyprus; of Minorca and Majorca; of the Venetians and Genoeſe. It is abuſed by Bynkerſhoek and Hubner as a farrago, *on un recueil aſſez mal choiſi*; but it is in general, and juſtly, reſpected as a moſt valuable treaſure (10), and Giannoni highly commends it.

(10) Thoſe who have peruſed the Conſolato, might almoſt imagine that the calumniators of the work had never read it with care. To my humble judgment, it appears a work of ſurpriſing merit, when we conſider the period in which it was compoſed—clear, conciſe, and judicious. The copy which I have uſed, was lent to me by the favour of a

The Black Book of the admiralty ſhall conclude this enumeration: it is a book of great authority, and ſo acknowledged to be by Selden, Prynne, Exton, and all others who have written on maritime law; it contains the ancient rules, or, as they are called, ſtatutes of the admiralty.

The records of the tower throw much light on the origin and juriſdiction of the admiralty. "The "ancient ſtatutes and uſages of the admiralty," ſays ſir Leoline Jenkins, "are ſome of them as "old as king Richard I. and John; others as "the famous inquiſition at Queenborough, now "four hundred years old."

Many of the ſtatutes or acts of parliament affecting the admiralty inſtance court cannot ſtrictly be ſaid to make part of the admiralty law, inaſmuch as they do not afford any rules or regulations for deciding cauſes therein; they go to limit its juriſdiction, to aſcertain its boundaries, and correct its exceſſes or encroachments on the common law. They therefore will come under the chapter which treats of the extent of its juriſdiction, except thoſe which relate to appeals, and the mode of criminal trials, and all which are properly referred to the head of practice. There are other ſtatutes which literally make part of this admiralty law,

friend; for the book is now extremely rare, and is in the Italian language, printed at Venice, in 1737, with the Spiegazione of Caſa Regis, and the Portoláno of Da Moſto, annexed.—I have ſince procured a copy, but without the *Spiegazione*. The *Guidon* may be found in a book eaſily had, called Coſtumes del Mer,

ſuch as thoſe regulating the contracts between ſeamen and maſters.

I have hitherto been ſpeaking principally of the grounds and origin of that law by which the inſtance court is governed. The whole ſyſtem of juriſprudence in the prize court, as lord Mansfield has obſerved, is peculiar to itſelf, and it hears and determines according to the courſe of the admiralty and the law of nations. In this court, therefore, we cannot have recourſe to the laws of Oleron, or Wiſbuy, or the Hans Towns; for they do not contain any regulations reſpecting the general law of prize, ſcarcely mentioning the ſubject, except incidentally, amongſt the accidents to which merchant veſſels are liable; and though in the Black Book of the admiralty there are ſome few articles concerning it, and alſo in the Ordinances of Barcelona, and two reſpectable chapters on prize law in the Conſolato del Mare; yet, for the moſt part, we muſt recur to the great and extenſive code of the law of nations, to its beſt interpreter the civil law, and to the eminent writers who have commented thereon.

The names of Grotius, Selden, Bynkerſhoek, Caſa Regis, Valin, Wolfe, and Vattell, are familiar to every advocate, and muſt employ his moſt ſerious ſtudies; while the numerous great and able deciſions of the eminent judge who now preſides in the engliſh high court of admiralty, promiſe to raiſe as ſplendid and as conſiſtent a ſyſtem of juriſprudence, in a court the importance of whoſe

deciſions has in our days intereſted all Europe, as was erected in the province of equity by lord Hardwicke, or by lord Mansfield in the ſphere of the common law.

The ſtatutes relative to prize are many, and ſhall be given under the head of prize law.

The acts of parliament, alſo, which relate to the cognizance and trial of offences in the court of admiralty, ſhall be given in the chapter which treats of the criminal court.

The juriſdiction of the criminal court, excluſively of ſtatute law, is chiefly regulated by the laws of Oleron, and the ancient ordinances and uſages of the admiralty.

My object in this chapter has been only to give a general ſketch of the ſources of the law by which this court is governed in its ſeveral branches. Its ſubſtance will be hereafter dilated and dwelt upon under the proper appropriate heads.

CHAPTER III.

ON THE PERQUISITES OF THE ADMIRALTY.

WHEN the office of lord high admiral exiſted in a ſubject with its full ſplendour and authority, the perquiſites attending it were numerous and various, the revenue prodigious, and the powers, as a learned gentleman has obſerved, ſo great and extenſive, that they were thought to tread upon royalty itſelf (1). Theſe droits or perquiſites, which flowed originally from the king by grant or uſage, or by his majeſty's aſſent in parliament, or from his royal proclamation, may be divided into civil and prize droits.

CIVIL DROITS.

The droits which I have termed civil, as diſtinguiſhed from thoſe ariſing in the courſe of war, principally relate to wreck of the ſea; to flotſam, jetſam, and ligan (2); to derelicts and deodands,

(1) The king's advocate, in the caſe of the Dickenſon. —Sir James Marriott's Reports of Admiralty Deciſions, page 11.

(2) Sometimes ſpelt flotſon, jetſon, and lagon.

not granted to lords of manors or others; to the goods of pirates convict, and, according to Jenkins(3), of traitors, felons, self-murderers, and fugitives found within the admiralty jurisdiction. These and all droits are specially reserved to the king in the patent appointing lords commissioners of the admiralty; and though granted by patent to the lord high admirals, were, by the last holders of that great office, re-assigned to the crown, as they were by prince George of Denmark, his successor the earl of Pembroke (4), and, before them, by James duke of York, after a friendly controversy which they had occasioned between him and his royal brother. This notwithstanding, and though the king is now the only lord high admiral, the interest of the king, considered in that capacity in these droits, is so entirely distinguished from that of the crown, that they are still viewed in the light of droits of *admiralty*, and called by that name.

Wreck.—This word is thus defined by the common lawyers: Such goods as, after a shipwreck, are cast upon land by the sea, and left there within some county; for they are not wrecks, it is said, so long as they remain at sea, within the jurisdiction of the admiralty. 2 Inf. 167. 560.

The statute 15 Richard II. chap. 3. declares that the court of the admiral hath no manner of cog-

(3) Sir L. J. 1 vol. 89. 98.—(4) See sir J. Marriott, p. 11.

nizance of any contract, or of any other thing done within the body of any county either by land or by water (5); nor of any *wreck* of the ſea; which declaration Mr. juſtice Blackſtone approving, adds a reaſon, viz. for it muſt be caſt on land before it becomes a wreck (6).

On the other hand, ſir L. Jenkins, in his charge given at a ſeſſion of admiralty (7) within the Cinque Ports, September 2, 1668, ſays, you are to enquire whether any lords of manors, or others, do challenge to themſelves *wrecks at ſea*, or *other droits of admiralty*, in their manors, without ſufficient title ſo to do; and theſe wrecks at ſea he diſtinguiſhes from jetſon, flotſon, lagon, and derelict, and therefore his meaning annexed to the words muſt be different from lord Coke's, or elſe he muſt have differed in opinion from him as to the law.

So, in like manner, in the inſtructions given by the lords commiſſioners of the admiralty to the receiver-general of the rights and perquiſites thereof (8), he is directed to enquire, make de-

(5) This, as I conceive, means the water of rivers; for on the ſea coaſts, the water between high and low water-mark, when the tide is in, is not in the body of the county, though the land in that ſpace is when the tide is out. See Sir H. Conſtable's caſe.

(6) 3 Black. Com. p. 10.

(7) Vol. 1. 88.

(8) See Sir J. Marriott's Reports, p. 71.

mand, and take poſſeſſion of all *wrecks* of the ſea, flotſons, jetſons, lagons, derelicts, ſhips and goods of pirates, deodands, and all other droits, rights, duties, and perquiſites, belonging to the lord high admiral.

And in a late caſe in the admiralty (9), the court ſays, "In caſes of *wreck* and *derelict*, many inſtances of great hardſhip have happened, nay, of crying injuſtice, where ſalvers have been amuſed with negociations till the goods were landed, and then the authority of the court has been defied, and the juſt demands of the claimants laughed to ſcorn, and the judge proceeds to expreſs his doubts how far change of locality, ſo effected, would be permitted to defeat the claims of ſubſtantial juſtice." Here, wreck is diſtinguiſhed from derelict, and wreck at ſea from wreck brought to land.

Either, then, there is a direct contradiction here between the two juriſdictions, or we muſt reconcile them by diſtinguiſhing between wreck *of* the ſea coming to land, and wreck *at* ſea, which indeed the common lawyers do not give the name of wreck. The diſtinction which ſir L. Jenkins takes is exploded, viz. that where any living creature is found on board, it is a droit of admiralty, and not a wreccum maris—ſee his 2d vol. p. 164.—that circumſtance is not now allowed to take any diverſity in the definition of wreck. In the twenty-

(9) Of the Two Friends, 1 Robinſon's Reports, p. 282.

third Article of Maſter Roughton both circumſtances ſeem to be combined in the meaning of wreck, viz. the cauſe of it happening *at ſea*, and no living creature eſcaping from thence to land.

But whatever ambiguity there may be in legal terms, in common parlance there doth not ſeem to be any, nor any doubt as to the law. A ſhip totally diſabled by the force of a tempeſt at ſea, though ſhe doth not founder, and though one or two of her crew may have been by accident left behind, ſo that ſhe is not a derelict, and being a whole ſhip and not a fragment, is not uſually called flotſam, it is commonly called a wreck; and ſhipwreck at ſea is as commonly ſpoken of as ſhipwreck on the ſhore: and if wreck at ſea can be diſtinguiſhed from flotſam and derelict, it is as clearly a droit of admiralty after a year and a day, as wreck on the ſhore is the king's jure coronæ, after the ſame lapſe of time. And between high and low water-mark, floating wreck, while the tide is in, is in the admiralty: ſtranded wreck, when the tide is out, is in the king, or, by grant from him, in the lord of the manor; and, in both caſes, *preſcription* may invert the right.

The finders of wreck, &c. muſt now, by ſtatute 26 George II. advertiſe it in the Gazette; and, in ſtrictneſs of ſpeech, it is not wreck until after the year and day elapſed. The laws reſpecting ſalvage are enumerated in the Appendix.

Jetſam. This is when a ſhip is in danger of being loſt, and, in order to ſave her by lightening her, ſome goods are caſt into the ſea; notwithſtanding which ſhe afterwards periſhes. This is Lord Coke's definition (10); but Mr. Blackſtone ſays (11), it is where goods are caſt into the ſea, and remain under water.

Flotſam is where the goods float upon the water (12).

Lagon is where heavy goods are caſt into or ſunk in the ſea, before a ſhip is loſt, but tied to a cock or buoy, in order, if Providence permits, to be found again.

Flotſam, jetſam, and lagon, are goods on or in the ſea, and belong to the king, who hath granted them to the lord high admiral. They will paſs by the grant of wreck, when caſt upon the land; but if they are not caſt upon the land, the admiral hath juriſdiction, and not the common law (13).

If any owner appear to claim them within a year and day, he is entitled to recover the poſſeſſion; and if they, being *bona peritura*, have been ſold, the profit muſt be accounted for to the true owner, he paying ſalvage; the ſtatutes as to wreck being by equity extended to theſe caſes.—See Sir Henry Conſtable's caſe, 5 Rep.

(10) 2 Inſtitute, 560. 106. (11) Comm. 1 vol. p. 291.

(12) Bracton, lib. 3. ch. 2. Bl. Com. 1 vol. 291. See 12 Anne, ch. 18. as to wrecks.

(13) 5 Co. 107 and 126.

If flotſam be drawn on ſhore, and be there ſeized by one upon the land, an action lies againſt him at common law, and not in the admiralty; for the incident becomes ſevered from the juriſdiction of the admiralty; but if the ſame perſon take the thing at ſea, and draw it on the land, and carry it away immediately, there the ſuit ſhall be in the admiralty, for it is one continued act (14).

Derelicts are boats or other veſſels forſaken or found on the ſeas without any perſon in them; of theſe alſo the admiralty has at firſt but the cuſtody, and the owner may recover them within a year and a day.

But that thing cannot be a derelict in the notion of the civil law which the owner quits through great fear, altogether againſt his will and intention. It is not enough that he leaves it *ſine ſpe revertendi*, but he muſt leave it *ſine animo revertendi*, at leaſt the thing muſt be ſo long a time without a poſſeſſion, that the true owner ſhall be preſumed to have given over all thought of it. Sir L. J. 2 vol. p. 767. "Hence," ſays Sir Leoline, "ſome learned men are of opi-
"nion, that the laws in the Digeſts, upon the

(14) 1 Rol. ab. 533. l. 10. If *jactus* be made by an enemy, the goods become the admiral's *immediately*, unleſs the purſuer take them up.——*Note*, An enemies ſhip, if a derelict, is a droit, and not prize. Caſe of the Minerva, 1786.

" title of derelicts, are now obſolete and uſeleſs, " ſo far are people now from leaving their pro- " perty behind them voluntarily (15)."

It is manifeſt, that when we ſpeak of derelict as a droit of admiralty, it cannot be in the ſenſe of the civil law, for thus there never could be any derelict conſtituting a droit.

All theſe droits, conſidered as perquiſites of the admiralty, or as producing to the king in that office a revenue, are of the leſs importance, becauſe it ſeldom happens that an owner is not found within a year and day, and therefore in general the admiral has only the cuſtody.

But if no owner be found, they become perquiſites of the admiralty (the crown having, in ſuch caſe, by the rule of all civilized nations, the excluſive property, and having with us granted it to the admiral) and the finder has no property in them. If no owner appears, or if the claimant cannot prove his property, the ſalvors have not acquired any right in the things found, but they muſt be ſatisfied for their expence and trouble out of the ſale of the ſhip and cargo (16).

(15) Goods caſt overboard to lighten the ſhip make no derelict, ſays Lord Coke. 5 Rep. 107. following the civil law.

(16) Theſe are the words of Sir E. Simpſon, an experienced practitioner, as quoted by the preſent learned judge, from manuſcript notes communicated by Dr. Swabey.

To proportion the quantum of ſalvage is the principal occupation of the court upon this head, the reſidue to go to the crown, if no owner be found, otherwiſe to the owner.

It has been inſiſted, that there was one univerſal rule—giving to the finder, in all caſes alike, without regard to the degrees of merit or ſervice, one moiety of the thing preſerved. But there is no ſuch rule in the practice of any European nation (17), though it certainly is given as the rule in Roughton's Articles.

Caſes of ſalvage, when they are fairly made out, and are not founded on falſe and frivolous pretenſions, are received in the court of admiralty with the moſt liberal encouragement. The exact ſervice is not the only proper teſt for the *quantum* of reward in theſe caſes, the general intereſt and ſecurity of navigation is a point to which the court will likewiſe look in fixing the reward (18). Salvage is not to be confounded with mere acts of pilotage (19).

The perſons entitled to ſalvage are not only the perſons actually employed in the very buſineſs of ſaving the ſhip, as the boat's crew ſent out by another ſhip, but alſo the perſons who remained on board to navigate the latter; and who thus, by additional labour, enabled the boat's crew to

(17) 1 Robinſon, 43 and 45.—(18) Ib. 313.
(19) Ib. 306.

be ſpared; and even a paſſenger who aſſiſts as a mariner, and likewiſe the owners (20).

Pirate's goods.—Bona piratarum paſſing by the uſual grant, the admiral ſhall have the proper goods of a pirate after his conviction (21).

When goods taken by pirates are brought to England, the owner may take them (22).

The ſhips and goods of pirates are the lord admiral's, as alſo all goods piratically taken from the king's ſubjects or friends (the cuſtody of them belonging to the lord admiral) in caſe they be not legally claimed within the year; and this, though the pirate ſhould be ſubdued and brought in by the king's own ſhips; for beſides that theſe goods are in the lord admiral's patent, there are precedents very full and appoſite to this effect (23).

To a queſtion raiſed, whether a king's man of war maſtering a pirate who hath an enemy's ſhip in his poſſeſſion, is to carry away the enemy for the king, quitting the pirate to the lord admiral? Sir L. Jenkins anſwers, that the pirate's occupancy, though it be for never ſo long a time, doth not alter or extinguiſh the property in his prize: which if it did, then might the pirate make a legal transfer of his poſſeſſion to another;

(20) Owners are entitled for the ſhip's loſs of time, changing its courſe, &c. &c.

(21) 3 Bul. 148. (22) 1 Roll. 285.

(23) 2 Sir L. J. 765.

this a juſt enemy can, a pirate cannot do. The king therefore being gotten by this caſual ſeizure into the poſſeſſion of his enemy's goods, the common maxim takes place—*Melior eſt conditio poſſidentis* (24).

Though we have juſt quoted a learned judge, ſaying, that a pirate can make no legal transfer, yet it is ſaid (25), that wherever a prohibition has been denied in admiralty ſuits, to recover pirate's goods which have been ſold upon land, they have been, where thoſe ſales were colluſive, and not if made on land, in market overt, and without fraud; and Sir Leoline himſelf ſays, that ſuch is the law of Spain and Venice, though contrary to the general law of nations; but that it is not our law, I think, appears clearly from hence, that there can be no legal transfer of captured property, even in market overt, without a ſentence of legal condemnation; and there can be no legal ſentence, condemning as prize, goods taken by a pirate.

Whole nations having a fixt domain, public revenue, and form of government (26), ſuch as the Algerines, are not treated as pirates.

In this, as in all other civil maritime caſes, if *new* matter and cauſe of action ariſe upon the

(24) 2 Sir L. J. 766.

(25) 1 Roll. ab. 530. Hob. 79. 2 Brownlow, 29. 2 Levynz. 25.

(26) 2d Sir L. Jenkins, 791.

land, this court loſes its juriſdiction, the new act being ſevered from the original, but not ſo if it be one continued act: Thus (27), where a ſhip and tackle were ſeized as pirate's goods in the Thames, and the owners ſeized and carried away the ſails and tackling, prohibition went, becauſe this matter aroſe ſubſequently, *infra corpus comitatus*; not ſo if they had remained on board, and been in the cuſtody of the admiralty on ſhore.

We have left but one droit yet unnoticed; to wit, deodands, which are things inſtrumental to the death of a man on ſhip-board, or goods found on a dead body caſt on ſhore. Theſe Jenkins enumerates among droits of admiralty; but Lord Coke ſays, there can be no deodand *in aqua ſalſa*. 3 Inſ. 58. but only in rivers or *aqua dulci*.

PRIZE DROITS.

The droits which accrue in time of war to the lord high admiral, far exceed in ſplendour and extent thoſe of which we have hitherto ſpoken. They have been deſcribed to be all the goods of the king's enemies taken without commiſſion (28), or found, or by accident brought within the admiralty commiſſion. But this deſcription is not ſufficiently perfect, nor ſufficiently accurate. In

(27) 1 Roll. ab. 530. 3 Bald. 147. 1 Showen, 179.

(28) By Comyns, in his Digeſt Admiralty, D. following Sir L. Jenkins,

the reign of Charles II. when the Duke of York was lord high admiral, many amicable conteſts aroſe between him and his brother, as to various goods and matters taken in the Dutch war; whether they belonged to the king *jure coronæ*, or to the duke, under his patent as perquiſites of the admiralty? The correſpondence of the duke with the judge of the admiralty on theſe ſubjects is curious and intereſting (29). At length theſe diſputes were ſettled and terminated by the following orders of the privy council, which have been looked up to as a ſtandard or wall of partition ever ſince.

Orders in a Council held at Worceſter Houſe, the 6th of March, 1665-6.

Whereas, through the long intermiſſion of any war at ſea by his majeſty's authority, ſeveral doubts have ariſen concerning certain rights of the lord high admiral in time of hoſtility, the determination whereof appearing very neceſſary for the direction, as well of his majeſty's officers as of thoſe of the lord high admiral; upon full hearing and debate of the particulars hereaftermentioned, the king's counſel, learned in the common law, and likewiſe the judge of the high court of admiralty, and thoſe of his majeſty's, and his royal highneſs the lord high admiral's

(29) Sir L. Jenkins, 2 vol.

counſel in the ſaid high court of admiralty, being preſent, his majeſty preſent in council was pleaſed to declare:

That all ſhips and goods belonging to enemies, coming into any port, creek, or road, of his Majeſty's kingdom of England or of Ireland, by ſtreſs of weather, or other accident, or by miſtake of port, or by ignorance, not knowing of the war, do belong to the lord high admiral; but ſuch as ſhall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and ſuch as ſhall be driven in and forced into port by the king's men of war; and alſo ſuch ſhips as ſhall be ſeized in any of the ports, creeks, or roads, of this kingdom, or of Ireland, before any declaration of war or reprifals by his majeſty, do belong unto his majeſty.

That all enemies ſhips and goods caſually met at ſea and ſeized by any veſſel not commiſſionated, do belong to the lord high admiral.

That ſalvage belongs to the lord high admiral for all ſhips reſcued.

That all ſhips forſaken by the company belonging to them, are the lord high admiral's, unleſs a ſhip commiſſionated have given the occaſion to ſuch dereliction, and the ſhip ſo left be ſeized by ſuch ſhip purſuing, or by ſome other ſhip commiſſionated, then in the ſame company, and in purſuit of the enemy (30); and the like is to be un-

(30) Where a non-commiſſioned ſhip is joint captor with a commiſſioned, the ſhare which the former would have

derſtood of any goods thrown out of any ſhip purſued.

The eminent judge who now preſides in the court of admiralty, has obſerved, that as long as the office of lord high admiral (though now reſiding in the perſon of his majeſty) continues in this kingdom to have a legal exiſtence, it is extremely proper that the droits and perquiſites of the office ſhould continue as anciently diſtinguiſhed; and although the difference may not be very important as to any immediate conſequence under the preſent application of them, (which is directed by the treaſury, and not by the admiralty) it is ſtill fit that they ſhould be ſtrictly, and with as much exact obſervance of the ancient rules, accounted for, as if the proceeds were carried in the ancient and diſtinct courſe. "Amongſt theſe "rules," ſays he, "I take it to be an eſtabliſhed "maxim, that the rights of the lord high ad- "miral are to be conſidered as rights ſtricti juris, "as rights originally granted, in derogation of "thoſe higher rights of the crown, which are "veſted in the crown for general utility: ſuch "grants are to be conſtrued ſtrictly on the known "preſumption, that the crown has not parted "with any right which the public wiſdom has "conferred upon it, farther than the expreſs "words of the grant import."

had if commiſſioned is a droit of admiralty. If a non-commiſſioned ſhip brings an enemy's veſſel into port, and though a commiſſioned ſhip ſeize her there, ſhe is ſtill a droit.

It is obſerved by the ſame high authority, that theſe rights of the lord high admiral are entitled to great attention and reſpect, but an extenſion of them beyond their abſolute limits, is not to be favoured by conſtruction; they are parts and parcels of the ancient rights of the crown, communicated by former grants to that great officer, under a very different ſtate and adminiſtration of his office, from that which now exiſt in practice.

It is then a general obſervation, applicable to theſe droits, that they, like all other grants of the crown, are to be ſtrictly conſtrued againſt the grantee, contrary to the uſual policy of the law in the conſideration of grants; and upon this juſt ground, that the prerogatives, and rights, and emoluments of the crown, being conferred upon it for great purpoſes, and for the public uſe, it ſhall not be intended that ſuch prerogatives, rights, and emoluments, are diminiſhed by any grant beyond what ſuch grant by neceſſary and unavoidable conſtruction ſhall take away.

Having premiſed theſe general remarks, taken from the higheſt authority, we proceed to comment upon the ſeveral parts of the orders of council above-mentioned, which are the grand guide in evidencing theſe droits granted to the lord high admiral. They give him the benefit of all captures by whomſoever made, whether commiſſioned or non-commiſſioned perſons, under certain circumſtances of ſituation and locality—that is, "of all enemies ſhips and goods coming into

" ports, creeks, or roads of England, or Ireland; " unleſs they come in voluntarily upon revolt, " or are driven in by the king's cruiſers (31)."

The firſt word here claiming our attention, is the word *coming*, which by uſage has been conſtrued to conclude ſhips and goods already *come* into ports, creeks, or roads, and theſe not only of England and Ireland, but of all the dominions thereunto belonging; but not into ports belonging to foreign powers. But on the words ports, creeks, or roads, conſiderable controverſies have ariſen, and it is now ſettled, that theſe words have a ſignification intimating certain known receptacles of ſhips, more or leſs protected by points and head-lands, and marked out by limits, and reſorted to as places of ſafety. Every anchorage-ground is not a roadſtead—a roadſtead is a known general ſtation for ſhips, *ſtatio tutiſſima nautis*, notoriouſly uſed as ſuch, and diſtinguiſhed by the name, and not every ſpot where an anchor will find bottom and fix itſelf. Were it otherwiſe, the admiral would be entitled, even if a ſhip at anchor in the channel of Dover was ſeized by a commiſſioned cruiſer.

The next words in the order of council to be obſerved upon, are, *by ſtreſs of weather, or other accident, or by miſtake of port, or by ignorance, not knowing of the war*; all veſſels under the above circumſtances, though taken by commiſſioned

(31) Theſe words are taken from 1 Robinſon's Reports, p. 232.

cruiſers, become droits of admiralty, much more if taken under the guns of a fort, and by a firing from the ſhore; the garriſon of the fort in ſuch caſe muſt be content to take a reward from the bounty of the admiralty, and not a prize intereſt under the king's proclamation. And even caſes may occur in which naval perſons, having a real authority to take upon the ſea for their own advantage, might yet entitle the admiralty, and not themſelves, by a capture made upon the ſea by the uſe of a force ſtationed upon the land. Suppoſe the crew, or part of the crew of a man of war were landed, and deſcried a ſhip of the enemy at ſea, and that they took poſſeſſion of any battery or fort upon the ſhore, ſuch as may be met with in many parts of the coaſt, and by means of ſuch battery or fort, compelled ſuch a ſhip to ſtrike; it is not to be doubted that ſuch a capture, though made by perſons having naval commiſſions, yet being made by means of a force upon the land, which they employed accidentally, and without any right, under their commiſſion, would be a droit of admiralty, and nothing more.

Such ſhips as revolt from the enemy, and voluntarily come into our ports are expreſsly excepted from being droits of admiralty, as may have been obſerved with reſpect to certain ſhips of the Dutch fleet during the preſent war; and we ſee alſo, that ſuch ſhips as have been forced into port by the king's men of war, or are deſerted at ſea in conſequence of purſuit by a com-

miſſioned ſhip, and then ſeized by ſuch ſhip purſuing, or by ſome other ſhip commiſſioned then in the ſame company, and in purſuit of the enemy, do belong to his majeſty.

Ships ſeized in any of the ports, creeks, or roads of the united kingdom of Great Britain and Ireland, *before* any declaration of war or repriſals by his majeſty, do belong unto his majeſty; and therefore the ſeizure of the Spaniſh ſhips, which happened to be in the ports of Ireland, on the breaking out of the preſent hoſtilities with Spain, as droits of Admiralty, was erroneous.

Though all veſſels detained in port, and found there at the breaking out of hoſtilities, are condemned jure coronæ to the king; yet if in our ports, an order of council puts a general embargo on the ſhips of any foreign ſtate, and repriſals afterwards take place, ſuch veſſels would not be condemnable as prize to the king jure coronæ; nor would ſuch an embargo extend to foreign ports; but this is only true of mere civil embargoes, where the hand of the cuſtom-houſe only is laid upon a ſhip in the civil mode of forbidding an egreſs, and not of reſtraints and compulſions acting by terror and force; for any mode of forcible occupancy or detainer prior to hoſtilities, is ſufficient to render the things ſeized droits of the admiralty.

Rebels goods have always been condemned as droits of admiralty, when taken by non-commiſſioned perſons.

It is notorious, that after war commenced, all commerce with the enemy, even without any expreſs edict to that purpoſe, is unlawful; and therefore merchandize put on board a cartel ſhip in our ports by Britiſh manufacturers, have been condemned as droits of admiralty.

The admiral was formerly entitled to the tenth of all prizes, and of this claim Sir L. Jenkins gives the following account: "There is no men-"tion," ſays he, "in the lord admiral's patent "of theſe tenths, nor is there any conſtant un-"interrupted cuſtom alleged for them, except-"ing in the caſe of private men of war, from "whom the lord admiral doth receive his "tenths. That the Earl of Warwick had them "given him by the late uſurpers, from the pub-"lic ſhips likewiſe, is yet freſh in memory; and "that after they had extinguiſhed the name "and office of admiral (as much as in them lay) "they ſequeſtered the tenths, as a diſtinct thing "in the provenue of their prizes, and applied "them to different uſes from the reſt.

"As for the ancienter preſidents, the ex-"chequer is more likely to afford them, if there "be any, than the court of admiralty; only it "appears by the black book in the admiralty "(which certainly is ancienter than King Edward "the Third's time) that the admirals (for then "there were three or four together) had their "dues and perquiſites eſtabliſhed unto them in "time of war. An admiral had, while on the

" king's ſervice by ſea or land, four ſhillings a
" day; if a knight, ſix ſhillings and eight-pence;
" if a baronet, thirteen ſhillings and four-pence;
" if an earl, more, an hundred marks a quarter;
" pour regard de trente hommes d'armes, thoſe
" are the words, two ſhillings a day for every
" chevalier; one ſhilling to every ecuyer; ſix-
" pence to every archer on board him. Beſides,
" he had ſhares (and the word ſhares is ſtill in
" his patent) in all prizes, whether taken by
" ſhips in the king's pay, or by private adven-
" turers; other perquiſites he had not worth the
" mentioning, becauſe proportioned to the rate
" of money, and to the tenuity of thoſe times.
" The lord admiral hath, it ſeems, none of
" thoſe petty perquiſites at this day; yet it can-
" not, I think, be denied, but that he has a
" right unto them, or to ſomething elſe in lieu of
" them, both virtute officii, and by the words
" of his patent, which gives him all the rights
" and emoluments of his place, in as full and
" ample manner as any of his predeceſſors en-
" joyed them. But how the appointment in the
" black book came to be diſuſed, does not ap-
" pear by any memorial that I can find in the
" admiralty: if it were changed into tenths, it
" were poſſibly in conformity to the french
" model, where the admiral, for his ſupport, and
" in conſideration of the dignity of his place,
" and the importance of his ſervice, had, in the
" year 1584, ſon droit de dizieme; it was then

" a right eſtabliſhed, not a new acquiſition, and " by edict confirmed unto him, not only of all " prizes whatſoever, but of all priſoners too, and " that ſuivant les anciennes ordonances, as by the " edict at large doth appear (32); and the benefit " of this precedent," ſaith Sir Leoline, " as I con- " ceive, was enjoyed by the Prince of Orange in " the ſame kind."

In more ancient times the lord admiral had a greater ſhare, according to the black book of the admiralty; in caſe of all prizes whatſoever, the king had but one-fourth; the lord admiral had two-fourths, and the reſt was divided; but this was before there was properly any royal navy, and when fleets fitted out were the ſhips of the ſubject; but when the royal navy was formed, the admiral got a tenth part of all prize goods, but this right has been entirely done away by the 13th Geo. II. cap. 4. ſec. 2.

We have ſeen that no droits, no profits, or emoluments, are veſted in the lords of the admiralty, but all reſerved to the crown by their commiſſion; but the power of collecting theſe perquiſites is in them, and accordingly they appoint their own collectors by their own commiſſion.

The board of admiralty is merely executive, as truſtees for his majeſty, and as a board of revenue in the caſe of droits. The power of collecting and receiving only remains with the officers of the admiralty, accountable to the lords commiſſioners of

(32) Edict Henry III. 17th April, 1584.

the admiralty, who, or any three of them, give diſcharges and quietuſes to the collector. So far the grant goes: but by courſe of office the lords are accountable to the exchequer, and grants of the droits are made by the king's warrants in the treaſury, upon petition.

There have been inſtances in which attempts have been made, under the words of particular acts of parliament, to diſtinguiſh between droits and forfeitures, and to inſiſt that the value of ſhip and cargo ſhould be paid directly into the exchequer (33), without paſſing through the hands of the high court of admiralty.

The diſtinct capacities of the king, claiming jure coronæ, and in his office of admiralty, occaſion a neceſſary diſtinction of officers, employed to enforce his rights.—A king's advocate and king's proctor or procurator general.—An advocate of the admiralty and proctor for the king in his office of admiralty. A receiver-general of the rights and perquiſites of the admiralty, and ſome correſpondent officer in his majeſty's office of treaſury, or an eſcheator, nominee, &c. &c.

The perquiſites of royal fiſhes, and of fines and amerciaments in the court of admiralty, are not worthy of being dwelt upon.

It is very obſervable, that at one period the king was, in the moſt literal ſenſe, the lord high

(33) See the remarkable caſe of the Dickenſon, in Sir James Marriot's deciſions of the high court of admiralty.

admiral (in the reign of Charles II.) there being for a ſhort time no lords commiſſioners of the admiralty.

We have already quoted from the higheſt authority the *dictum*, that the reſolutions of 1665 *give* to the admiral the benefit of all captures, whether made by commiſſioned or non-commiſſioned perſons, of enemies ſhips or goods coming into ports, &c. unleſs they come in by revolt, or are driven in by the king's cruizers. And yet it is worthy of notice, that Sir Leoline Jenkins maintains, that though ſeizures in port, after a declaration of war by perſons non-commiſſioned, make droits of admiralty, the king's prerogative of ſeizing enemies goods *jure belli*, or *jure repriſaliarum*, is ſtill concurrent with that of the lord admiral, within his juriſdiction, and commiſſioned ſhips in the king's ſervice may alſo ſeize in port (34). "For," ſays this learned judge ſo often quoted, "the right in port doth not appear to be in the "lord admiral to the prejudice of the king's own "ſhips, either by patent or by preſcription. Not "by patent, for the words *bona inimicorum caſu "fortuito reperta*, do refer as well to the open "ſeas (and there the lord admiral claims not "againſt the king's ſhips) as to the ports." Nor by preſcription, as the learned judge proves by

(34) That is, as I underſtand his opinion to be, if the ſubject matter has not been previouſly ſeized by a non-commiſſioned perſon, and ſo become veſted in the lord high admiral as a droit.—See Sir L. Jenkins, 2d vol. p. 765.

appeal to the precedents by him found; "and if it "were otherwiſe," ſaith he, "the king's ſhips would "be in a condition more bounded and reſtrained "than the *private* men of war, who are commiſ- "ſioned to ſeize in port, as well as upon the open "ſea. And when the king grants this power (which, "even where there was a diſtinct lord high admiral, "was granted not *virtute officii*, but by ſpecial "commiſſion) he cannot be intended to exclude "his own ſhips from that liberty."

It ſeems difficult to reconcile this opinion with that firſt mentioned, unleſs they refer to ſhips under totally different circumſtances, and that Jenkins ſpeaks only of caſes omitted in the reſolutions of 1665. Let us put this caſe: a neutral ſhip, after war commences, comes into one of our ports, having an enemy's cargo on board, and this not through ſtreſs of weather, nor by accident, nor ignorance of the war. It ſeems to be a caſus omiſſus in the reſolutions of 1661.

Undoubtedly the orders of council in 1665 leave ſtill latitude for controverſy, and many caſes unſettled. If a neutral veſſel brings in an enemy's cargo, as ſuppoſe of French wines, during a French war, to ſell in theſe countries; or if an enemy's ſhip of war coming with the purpoſe of hoſtile invaſion into one of our ports, as the French have done into Bantry Bay, were there captured by an Engliſh man of war; theſe will be found to be caſes not deſcribed in the ſecond or any article of thoſe orders. And it is obſervable, that the framers of

the prize acts, as if they had not theſe orders in contemplation, or had forgotten them, do in general words ſay, that perſons taking ſhips or veſſels in any creek, haven, or road, ſhall have the ſole intereſt therein after adjudication.

Still further to confirm this aſſertion, that there is ſtill room left for doubts by theſe orders, it muſt be noticed, that ſo lately as in the year 1782, a queſtion was ſtarted in the caſe of the Le Hazard and other ſhips, in the reſolution of which eminent civilians differed in opinion, whether a diſtinction was to be eſtabliſhed between ſhips taken *before hoſtilities* declared, and ſhips taken afterwards, upon any expreſſion in the ſaid orders of council of 1666, ſo as to entitle the admiralty in the one caſe, and exclude it in the other? And the better opinion appeared to be, that the expreſſion *enemies* ſhips in the ſecond clauſe includes all ſhips *adjudged* to be enemies ſhips, whatever be the ground on which they were adjudged, and whether that ground was precedent or ſubſequent to the act of capture, becauſe it is the adjudication, and not the capture, which declares the quality and character of the ſhip (35).

(35) Thus in the caſe of the Saint Croix, a French ſhip, taken in 1775, before any declaration of hoſtilities againſt France, and therefore reclaimed, the order for hoſtilities iſſuing before adjudication, ſhe was conſidered as a droit of admiralty. Yet in the caſes of the Santa Catalina and St. Catherina, contrary opinions were held.

CHAPTER IV.

ON THE JURISDICTION OF THE INSTANCE COURT.

THE limits and extent of the juriſdiction of the inſtance court have been the ſubject of ſuch warm controverſies in the courts of common law on queſtions of prohibition, and however they may be now well underſtood in the ſupreme courts in England, ſtill afford ſo much room for diſpute and doubt before the tribunals of other countries appendant to the Britiſh crown, that it is ſurely worth our pains to try, both upon principle and by authorities, to fix theſe hitherto confuſed boundaries. Yet, in endeavouring to do ſo, my reſearches, from want of reports of caſes in the admiralty inſtance court, muſt chiefly be confined to the doctrines and deciſions of the law courts; although poſſibly, in ſome of the caſes, the admiralty would ſtill decree for its own juriſdiction (1), if not

(1) Thus it ſhould ſeem, notwithſtanding the reſolutions or determinations of the law judges, that, in the caſe of Ladbroke *v.* Cricket, 2 Term Reports, 649, the court had exerciſed its old power of trying an hypothecation or bottomry bond and its validity, though made on land, in England, between Engliſh ſubjects, and under ſeal, where the defendant had not objected to the juriſdiction.

prohibited, and no plea put in to their jurisdiction, or appearance under protest.

I shall consider its jurisdiction—First, with respect to contracts, then with respect to torts.

CONTRACTS.

The contracts over which it has jurisdiction, or of which it has cognizance, are marine contracts, *i. e.* contracts made on the sea, whose consideration is maritime, and not ratified by deed nor under seal. This description appears to my humble judgment, according to the received authorities, the most accurate that can be given, though to the parts of it there are exceptions as to every general rule, and though, as I hope to prove, reason would dictate very different limits. And first—

Contracts cognizable in the Admiralty must be made upon the Sea

This rule is universally known, and mentioned by every writer who has treated of the admiralty law; yet the controversies and disputes with respect to its construction have filled numerous volumes, the courts of law interpreting it with the utmost strictness, while that of admiralty strove to give it extraordinary latitude, and each of these jurisdictions, in former times, adhering to certain technical assertions, without adopting fixed rational principles.

Thus the admiralty, adhering to the letter of the rule, wiſhed to draw within its province the trial of all agreements made upon the ſea, though not relative to maritime affairs; until, in Bridgeman's caſe, it was decided that the validity of a contract made at ſea, not for or by reaſon of any marine affair or matter, was triable only by the common law (2). And here, if the judges of thoſe courts had ſtopped, they would have reſted on a rational principle; but they proceeded to aſſert, that even merely marine contracts, though made upon the ſea, if to be executed upon the land, were triable only in their courts; and that, even though they were not to be executed on the land, they might be made triable at the common law, by ſuppoſing them to have been done at Cheapſide and ſuch like places; and, what is ſurprizing, Sir William Blackſtone, in our own times, ſeems to recognize and to juſtify both theſe poſitions.

The fictions we have alluded to are ſeldom or never to be found in more modern reports, though of old they were thought worthy of the pens of Godolphin and Sir Thomas Ridley in attacking them, and of Lord Coke in their defence; and

(2) The words of Lord Hobart, in Bridgeman's caſe, relate only to obligations, *i. e.* in the common legal ſenſe of the word, bonds or other ſpecialties; but his reaſoning extends to any agreement whatſoever. It ſeems to have been the caſe of a captain of a ſhip empawning the ſhip at ſea for his own private debt.

Blackſtone, when he ſays that it is no uncommon thing for a plaintiff to feign that a contract, really made at ſea, was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the ſuit from the courts of admiralty to thoſe of Weſtminſter hall, quotes no authority later than the 4th Inſtitute, 134.

As to the other poſition, that a contract made upon the ſea is not cognizable in the admiralty, becauſe it is covenanted to be afterwards executed upon the land, it ſurely is not true; and wherever its juriſdiction is excluded as to agreements upon the ſea, that is not the reaſon. This is admitted by Lord Hobart in the very caſe of Bridgeman. He granted the prohibition prayed, becauſe the ſubject matter of the ſuit in the admiralty did not appear to be a marine contract; but he admitted, that if the captain upon the ſea, his ſhip being in diſtreſs, empawned or hypothecated the ſhip for neceſſaries, though his undertaking was afterwards to be fulfilled, or the money to be paid, upon land, that the admiralty had juriſdiction.

The courts of law, not content with theſe endeavours which ſeem of late to have been forgotten, made other attempts, in which, to the detriment of the public, they have been more ſucceſsful. Adhering on their part to the ſtrict letter of the rule, that the buſineſs of the admiralty was only with contracts made upon the ſea, they here took locality as the only boundary, though, in the inſtances before mentioned of con-

tracts made on ſea, they refuſed this limit; and having inſiſted, as indeed Judge Blackſtone has even of late done (3), that contracts upon land, though to be executed on the ſea; and contracts at ſea, if to be executed on the land, were not cognizable by the admiralty, they left to it the idle power of trying contracts made upon the ſea to be alſo executed upon the ſea, of which one inſtance might not happen in ten years, and than which, indeed, nothing can be conceived more rare.

It had been the practice of the admiralty, in the beginning of the laſt century, to exerciſe juriſdiction as to contracts made upon land but relative ſolely to ſhipping and naval affairs, particularly with reſpect to material men, *i. e.* ſuch as furniſh tackle, furniture, or proviſions, for the repairing of ſhips, or ſetting them out to ſea; as

(3) Mr. Juſtice Blackſtone's words are:—"If part of any "contract, or other cauſe of action, doth ariſe upon the "ſea, and part upon the land, the common law takes place "of the particular. Therefore, though pure maritime ac- "quiſitions, earned and becoming due on the ſea as ſeamens "wages, are one proper object of admiralty juriſdiction, "though the contract be made on land; yet, in general, if a "contract be made in England to be executed on the ſeas, as "a charter-party that a ſhip ſhall ſail to Jamaica, or be in "ſuch a latitude by ſuch a day; or a contract made on ſea to "be performed in England, as a bond made on ſhipboard to "pay money in London; theſe mixed contracts belong not "to the admiralty juriſdiction."

well as to freight, charter-parties, and other marine contracts, though made upon land. Infinite were the advantages attending this practice. If a foreign merchant owed money to an Engliſhman, any ſhip of his coming into the river was liable to arreſt, the creditor not being obliged to look for his debtor in a foreign country, and poſſeſſed of a ſecurity here; and by this means the forcigner alſo was better enabled to gain credit here upon occaſion. On the other hand, if an Engliſh merchant owed money upon a foreign contract, the plaintiff might have, if the inſtrument was denied, a commiſſion into his own country pro ſcrutinio, which he could not have at common law (4). And as all merchants abroad make their contracts according to the marine or civil law, it was a great ſatisfaction to them to have their ſuits determined in a court governed by that law. If the maſter or owner of a ſhip alſo ſued for freight, the merchant could in that court, if he received damage, make ſtoppages to the amount of the damage; and the perſons who furniſhed tackle, furniture, or proviſion for ſhips, or were employed in repairing them, inſtead of having remedy at law only againſt the maſter (who, though he beſpoke the materials, is commonly not worth the twentieth part of the value) having their remedy

(4) Mr. Juſtice Blackſtone is forced to confeſs the want of this power, 3 vol. Comm. p. 75. when ſpeaking of policies of inſurance.

againſt the ſhip, were ready to give by twenty-fold more of credit to the owner. Add to all this, that charter-parties, which are only calculated for ſea affairs, were interpreted and adjudged by the ſea laws; and all cauſes were determined with the utmoſt expedition, according to the ſtyle of the court, not from term to term, but from day to day, and tide to tide, all the year round.

Theſe arguments were dilated and put with irreſiſtible force by Sir Leoline Jenkins (5), in the reign of Charles II. After numerous prohibitions had on ſuits to the admiralty upon the ſubject above-mentioned, he is ſupported by the agreement entered into in the year 1575 between

(5) Sir Leoline Jenkins having been much in confidence with the Stuart family, was decried, or at leaſt ſlightly ſpoken of, by Burnet and others after the revolution: he was, however, a conſiderable man; and many of his ſchemes and deſigns, if they had been carried into execution, would, in my humble opinion, have been very ſalutary to the ſtate, particularly that for eſtabliſhing a ſtanding and permanent court of delegates. His authority in matters of the admiralty is deſervedly high, and every ſtudent ſhould peruſe his celebrated argument before the houſe of lords, in the reign of Charles II. on a bill to aſcertain the juriſdiction of the admiralty. In this he ably points out the inconveniences to the public, and to the trade, if that juriſdiction be evaded. 1ſt. As to foreign contracts, or thoſe made abroad. 2d. As to mariners wages, freight, and charter-party. 3d. As to building and victualling of ſhips, and as to material men, *i. e.* who furniſh materials or ſupply work for the ſhip. 4th. As to diſputes between part-owners.

the judges of the king's-bench and the court of admiralty, and alſo the reſolutions entered into by all the privy-council of England, and ſubſcribed by all the judges in the year 1632 (6), which, as Sir Leoline obſerves, were the reſult of many ſolemn debates, and not the effect of artifice or ſurprize, in proof of which the uſurpers, after the death of King Charles I. though they aboliſhed the office of lord high admiral, made ordinances ſimilar to the above reſolutions of the council; and that, at the reſtoration, the merchants petitioned for a re-eſtabliſhment of rules according to thoſe of 1632.

Theſe reſolutions are as follow:

"If ſuit ſhould be commenced in the court of admiralty upon contracts made, or other things perſonal, done beyond the ſeas, or upon the ſea, no prohibition to be awarded.

"If ſuit be before the admiral for freight, or mariners wages, or for breach of charter-parties, for voyages to be made beyond the ſeas; though the charter-party happen to be made within the realm, ſo as the penalty be not demanded, a prohibition is not to be granted: but if the ſuit be for the penalty; or if the queſtion be, whether the charter-party were made or not, or whether

(6) To theſe reſolutions the objection cannot be made, which is urged by my Lord Coke, 4th Inſtitute, p. 136, to the agreement of 1575, viz. that though it was read over in his majeſty's preſence, and the hearing of the judges, yet they never aſſented thereto.

the plaintiff did releaſe or otherwiſe diſcharge the ſame within the realm; this is to be tried in the king's courts at Weſtminſter, and not in his court of admiralty.

"If ſuit be in the court of admiralty for building, amending, ſaving, or neceſſary victualling of a ſhip, againſt the ſhip itſelf, and not againſt any party by name, but ſuch as for his intereſt makes himſelf a party, no prohibition is to be granted, though this be done within the realm.

"Although of ſome of thoſe cauſes ariſing upon the Thames beneath the firſt bridge, and divers other rivers beneath the firſt bridge, the king's courts have cognizance; yet the admiralty has juriſdiction there, in the points ſpecially mentioned in the ſtatute of 15 Richard II. And alſo, by expoſition of equity thereof, he may enquire and redreſs all annoyances and obſtructions in theſe rivers, that are any impediment to navigation or paſſage to or from the ſea; and alſo may try perſonal contracts, or injuries done there, which concern navigation upon ſea. And no prohibition is to be granted in ſuch caſes.

"If any be impriſoned, and upon habeas corpus brought—if it be certified that if any of theſe be the cauſe of his impriſonment, the party ſhall be remanded (7)."

(7) Theſe reſolutions are inſerted in the early editions of Croke's Reports, but left out in the later, ſeemingly *ex induſtria*. They are ſet forth by Zouch on the Admiralty Juriſdiction.

Notwithſtanding all theſe authorities and arguments, it ſeems now ſettled that the ſhip cannot be hypothecated at home before the voyage commences (8), and that no perſon can ſue in the admiralty for work and labour done in port before the voyage begins, or neceſſaries ſold for the ſhip's uſe before ſhe ſails (9); and which is more ſevere, and indeed almoſt bordering on abſurdity, it has been determined (10), that where neceſſaries

Some of the advantages of the admiralty juriſdiction are alſo well ſummed up in Le Caux *v.* Eden, Douglas, 600, where it is obſerved, that if foreigners were obliged to ſue at common law in ſuch caſes, they could very rarely remain in England with their witneſſes the neceſſary time; whereas by the rules of the admiralty, a cauſe can hardly laſt a month: but the great convenience is, that all parties concerned may join in one libel; whereas, at law, the coſts alone of the numberleſs ſuits to which captors—and, I add, creditors—on account of the ſhip, would be expoſed, independent of damages, would deter any man from ſuing.

(8) Liſter *v.* Baxter, Strange 695. See, however, Lord Mansfield's words, Cowper, 639. and 1 Term Rep. 109.—It is ſaid, that every contract with the maſter of a ſhip implies an hypothecation by the maritime law; but it is otherwiſe by the laws of England—2 Lord Raymond, 806.—While at home, it is ſimply a mortgage of the ſhip, as of any chattel.

(9) See Roſs *v.* Walker, 2 Wilſon, 264.—Watkinſon *v.* Barnardiſton, 2 P. Wm. 367.—and Wilkins *v.* Carmichael, Douglas, 97.

(10) In Juſlin *v.* Ballam, 2 Lord Raymond, 805. I can ſcarcely conceive that ſuch a determination would be made now, when the ſame irrational jealouſy of the admiralty doth not exiſt.

were ſupplied to a foreign ſhip lying in our ports, though the maſter was dead and the owners foreigners, yet ſuit in the admiralty could not be brought againſt the ſhip, nor ſhe detained, without an expreſs hypothecation. It has, indeed, been a queſtion noticed by Sir William Scott (11), whether material men, ſuch as ſhip-builders, rope-makers, &c. may not be allowed to take money out of the proceeds ariſing from the ſale of the ſhip, and being in the regiſtry or hands of the court, though they would not be allowed to proceed originally againſt the ſhip.

With reſpect to charter-parties, it is ſaid by the higheſt law authorities, my Lord Coke, in the fourth Inſtitute, p. 135 and 139, and Mr. Juſtice Blackſtone, vol. III. p. 106, that if a charter-party be made in England, and to be executed upon the ſeas, as that a ſhip ſhall ſail to ſuch a place, or be in ſuch a latitude on ſuch a day, like any other contract, or covenant, or cauſe of action, part of which ariſes upon the ſea, and part upon the land, that it belongs not to the admiralty juriſdiction, but to the courts of common law.

A charter-party (which differs from a bill of lading only in this (12), that the latter is required

(11) In the caſe of the Favourite, 2 Robinſon's Admiralty Reports, 236.

(12) Beawe's Lex Mercatoria, p. 137.—and ſee Forms of Charter-Parties, p. 134.

and given for a ſingle article, or more, laden on board a ſhip that has ſundry merchandizes ſhipped for ſundry accounts, whereas a charter-party is a contract for the whole ſhip) may be ſaid to conſiſt of two parts, in the former of which the parties covenant, in the latter bind themſelves under a penalty to perform their covenants. And here the clear diſtinction mentioned in the reſolutions of 1632 has been often urged with great force (13), viz. that if the ſuit was not for the penalty, the admiralty ought not to be prohibited; but Mr. Blackſtone, and other writers on the common law, make no ſuch diſtinction or exception.

As to freight, the maſter has a lien on the cargo while it remains in his hands, in which caſe he may retain it till his freight is paid; but it is ſaid, that if he once part with the poſſeſſion of the goods, he cannot afterwards retake them, or the produce thereof (14), by any admiralty or other proceſs.

The cognizance of policies of inſurance was of old claimed by the court of admiralty, in which they had the great advantage attending all their proceedings as to the examination of witneſſes beyond the ſeas or ſpeedily going out of

(13) And in Ireland, as I have known, with ſucceſs, in the caſe of the Jenny of Pingely.

(14) 2 Lord Raymond, 934. 6 Mod. 12. 11 Mod. 6. But ſee the determination in Smart *v.* Wolff, 3 Term Rep. p. 323.

the kingdom; and when a court of policies of assurance was erected, in pursuance of the statute 43 Eliz. ch. 2. (which recites the immemorial usage of policies of insurance) parliamentary powers for the same purposes were vested in the commissioners. Sir William Blackstone feelingly laments the want of similar powers in the judges and juries who now usually try insurance causes, and thereby unwittingly, but deservedly, compliments the proceedings of the civil law (15).

As to foreign contracts, or contracts made abroad upon land, in partibus transmarinis, though the resolutions of 1632 above alluded to say, in direct terms, that if suit be commenced in the admiralty upon contracts made, or other things personal done *beyond the seas*, or upon the sea, no prohibition is to be awarded; yet it is generally held that prohibition would go, if the admiralty were to attempt to try such foreign contracts; and my Lord Coke says decisively, that if any indenture, bond, or other specialty, or any contract, be made *beyond the sea*, for the doing of any act or payment of money within the realm or otherwise, wherein the common law can administer justice, that the cognizance thereof neither belongs to the lord high admiral, lord high constable, nor earl marshal of England, but to the common law only (16). Notwithstanding this, in a late case

(15) 3 Black. Comm. p. 75.

(16) 4th Institute, p. 134 and 140. He is supported by 1 Roll. Ab. l. 50. Cro. Car. 603. Dubitatur, 2 Roll. 493.

it was held (17), that if an hypothecation bond be executed upon land abroad, it was cognizable by the admiralty, the judges ſaying that it was abſurd to ſuppoſe it neceſſary for the captain to go upon the ſea to execute ſuch a contract abroad, and that, in this inſtance, not locality, but the ſubject matter, muſt determine the juriſdiction (18).

And here a diſtinction muſt be taken; for if the contract in foreign parts be incident to, and one continued act with, a matter that originally happened upon the ſea, over which original matter the admiralty had juriſdiction, the contract alſo is within its cognizance. Thus, if a ſhip be taken by pirates upon the ſea, and afterwards ſold by them on land, that pretended contract of ſale would be ſet aſide in the admiralty; and hence there is room for much controverſy in ſuch caſes, whether ſuch contracts be incident to original acts on the ſea, or whether they may not become

and 3 Leon. 232. The ſayings of my Lord Coke are the leſs to be regarded, becauſe, as Mr. Juſtice Buller has truly remarked, in 3 Term Reports, p. 348, Smart *v.* Wolff, he ſeems to have entertained not only a jealouſy of, but an enmity againſt, the admiralty; and after he became chief juſtice, in 1605, the controuls on that court perpetually increaſed. In fact, Lord Coke could not endure any thing connected with the civil law.

(17) Menetone *v.* Gibbons, 3 Term Reports, p. 267.

(18) 1 Ventris, 308.

ſevered by ſome circumſtance upon land, as for inſtance, by ſale in market overt (19).

Little then was left for the authority of the admiral to operate upon on the ſubject of contracts, amidſt theſe curbs ſo eagerly and rapidly thrown upon him in the laſt century, ſave expreſs hypothecations of ſhip or goods made at ſea or in foreign parts, and ſuits for ſeamens wages; the attempts to divert which laſt from his tribunal ſhall, in the next place, be conſidered.

Amidſt the torrent of prohibitions which poured forth in the laſt century upon the ſubjects abovementioned, and were founded, as I hope preſently to ſhew, more in prejudice than reaſon, the courts of common law found themſelves ſuddenly ſtopped in their career by the infinite miſchiefs which aroſe from extending their principle, that no contract made upon land was cognizable in the admiralty, to the caſes of ſeamens wages. The advantages of being able to join all in one ſuit, of having the ſhip for their ſecurity, and of getting their claims determined in the ſhorteſt ſpace of time, which, in the language of the admiralty, is to be between tide and tide, ſo as to enable them to go to ſea again immediately, are ſo manifeſt; and

(19) That if goods, even taken by pirates, are ſold upon land in market overt, and the vendee acting without fraud be ſued in the admiralty, a prohibition goes, is held in 1 Roll. 531. l. 52. and in 2 Brownlow, 29.—1 Ventris, 173.—2 Levyn. 25.—and maintained to be law in Smart v. Wolff, 3 Term Reports, p. 336.

the hardſhip of driving them to their remedy at common law ſo intolerable, that here theſe courts were forced to yield, though not without ſome ſtruggle (20), and to remit the power to the court of admiralty.

This power of that court was recognized by a ſtatute of Richard II. and, at a much later period, by an ordinance of the rump parliament, and allowed to be legal in Serjeant Roll's famous abridgment; and, though diſputed after the reſtoration, was, during the reign of King William, finally eſtabliſhed, and never ſince controverted. It is held that ſeamen may ſue, though the work is done in the river (21), provided the wages are not due by deed or ſpecial agreement; becauſe the ſhip is liable, and they may all join in the ſuit, neither of which may be at common law, and yet much for the eaſe of poor ſeamen (22).

Sir Leoline Jenkins here triumphantly aſks, if mariners wages then belonged to the cognizance of the admiralty, why not freight as well, freight being the mother of wages? And, in truth, Lord Chief Juſtice Holt had no better anſwer to make to

(20) See Winch. p. 8. 1 Lord Raymond, p. 576. Alleſon *v.* Marſh, 2 Ventris, 181. Coke *v.* Cretchell, 3 Levynz, 60. An anonymous caſe, 1 Ventris, 343. Clay *v.* Snelgrove, 12 Mod. 405.

(21) 2 Lord Raymond, 1044.

(22) Opy *v.* Child, 1 Salk. 31. Howe *v.* Napier.

this forcible reaſoning, but this, that it was an indulgence to the poor ſailor, and that in his caſe *communis error facit jus*, as if, ſays the learned Mr. Douglas (23), any uſage or common error could abrogate the ſtatutes which are here ſuppoſed to controul the admiralty juriſdiction, or could abrogate a ſtatute to any purpoſe.

A more plauſible reaſon, however, of this exception, has been given by Lord Mansfield; it is this, that ſailors do not, in their demand, ſtate a contract, but go only upon the marine ſervice, and merely give the contract in evidence. But the maſter's ſervice alſo is maritime: why is he not allowed to give his contract in evidence againſt the owner?

In reſiſting the bringing of ſuits in the admiralty by other perſons of the claſs of mariners, the municipal courts have ſtill perſiſted, and the pilot who guides the ſhip into port (24), the maſter

(23) Now Lord Glenbervie, in his Reports, p. 102. in his note on the caſe of Wilkins *v.* Carmichael.

(24) This is ruled, as to the pilot, if his exertions are within the body of a county, as from Sea Reach to Deptford, in Roſs *v.* Walker, 2 Wilſon, 264. Suppoſe, then, the pilot was taken on board near the iſle of Lundy, in the Briſtol Channel—here ariſes a great diſpute between Lord Coke and his opponents. "Wherever you can ſee from "ſhore to ſhore," ſays the former, "is within the body "of the county."—"Then," ſay his adverſaries, "the ſea "between Cornwall and the Scilly Iſlands cannot be within "the admiralty juriſdiction; for they can be ſeen, or ſome "of them, from the coaſt of Cornwall." But, ſurely,

who governs her at ſea, and even the mate, who, by the death of his ſuperior, becomes maſter during the voyage (25), are excluded from this natural and eaſy remedy, when refuſed compenſation.

Let us here pauſe, and, after conſidering all the matters premiſed, aſk ourſelves what is the *rationale*, and what the true principle which ought to govern this queſtion, viz. What contracts ſhould be cognizable in the admiralty? Is it not this? All contracts which relate purely to marine affairs, the natural, ſhort, and eaſy method of enforcing which is found in the admiralty proceedings, and particularly thoſe which attach *in rem*, which the common law cannot enforce in that mode, and *in rem only*, for the breach of which the common law cannot give any remedy at all, are or ſhould be properly within the province of the admiralty, whether made upon land or upon water; in other words, that the ſubject matter, and not locality, ſhould determine the juriſdiction as to contracts.

Is not this the principle laid down by Lord Mansfield, in Howe *v.* Napier, as to ſeamens wages,

Lord Coke is ſpeaking of rivers, or creeks, or arms of the ſea, not of the ſhore of the main ocean. The Scilly Iſlands are part of the county of Cornwall, but the ſea there is not of any county. See Godolphin, p. 138.

(25) The mate may ſue for his wages, but not the maſter, nor the maſter's executors. Mate, who afterwards becomes maſter, can ſue in the admiralty only for his wages as mate. Strange, 937. 2 Lord Raymond, 577. 1 Salk. 33.

when contracted for in the uſual form, though upon land, and by all the judges in Menetone *v.* Gibbons, as to hypothecations made upon land abroad (26)? What rational argument can be made againſt extending this principle to all caſes whatſoever? By not doing ſo, it ſeems, to my humble judgment, that all the contradictions, inconſiſtencies, and uncertainty, which to this moment reign over this diſputed juriſdiction, have been introduced.

Hence the contradiction of ſaying, that though the maſter's contract and ſervice be marine, and even the contract made on the ſea, as when he becomes maſter in the courſe of the voyage, he ſhall not ſue in the admiralty like the mariners (27)—that a man may raiſe money on the ſecurity of the ſhip abroad by hypothecation, but not at home—and that contracts not marine made on

(26) I am aware that it may be ſaid, that this deciſion in Menetone *v.* Gibbons reſted on the ground that there was no remedy elſewhere. Is that then the principle, that contracts, though made on land, and under ſeal, if no remedy elſewhere, are triable in the admiralty? This would be a totally new principle.

(27) It cannot be ſaid, in the caſe of the mate becoming maſter by the death of the maſter at ſea, that his contract is on land. His being forbidden to ſue in the admiralty is, as is ſaid, becauſe he doth not reſt on the credit of the ſhip. Is that then the principle, that no contract is ſuable in the admiralty, except that which attaches in rem? Thus, we ſee the ground has been ſhifted three times.

ſea ſhall not be affected by locality, contracts marine made on land ſhall; and that it is abſurd, when abroad, to go upon the water to ſeal a marine contract, but not ſo at home.

Thus we ſee, when we leave the plain principle of the ſubject matter determining the juriſdiction, there is no reſt for the ſole of the foot; and ſurely it ſeems but conſiſtent, that as a contract, though made upon the ſea, if not relative to maritime affairs, is triable only in the courts of common law; ſo a contract made upon the land, if relative ſolely to maritime affairs, ought to be cognizable in the admiralty: for, as Sir L. Jenkins obſerves, how can the execution of a charter-party upon land to go from London to Liſbon make a cauſe a land cauſe, ſince the main ſcope of the charter-party is to be performed on the ſea, and nothing of the *undertaker's* buſineſs is to be performed upon the land? A writer, in the beginning of the eighteenth century, exactly agrees with my opinion, when he ſays, "The juriſdiction of the admiralty ought "naturally to ariſe from the nature of the cauſe, "and not from the place where any bargain or "contract is made; ſince it cannot be denied that "things may be, and daily are, tranſacted at land, "which have only regard to maritime affairs; "and things may alſo happen to be tranſacted at "ſea, which may properly belong to the cogni-"zance of another court."

It cannot be expected, however, that in a didactic treatiſe of this kind I ſhould venture, ex-

preſsly and poſitively, to deliver doctrines in oppoſition to thoſe of Lord Coke and Sir William Blackſtone; and, therefore, in compliance with the uſually received authorities on the point, I have laid down as our firſt rule, that contracts cognizable in the admiralty muſt be made upon the ſea.

Our next enquiry then muſt be, What is meant by the ſea? By the ſtatute of 15 Rich. II. cap. 3. it is enacted and declared, that the court of admiralty ſhall have no cognizance of contracts, pleas, and quarrels, or other things done within the bodies of the counties, as well by land as by water. Nevertheleſs, of the death of a man, and of mayhem done in great ſhips being and hovering in the main ſtream of great rivers, only beneath the bridge of the ſame rivers nigh to the ſea, *infra primos pontes*, and no other places of the ſame rivers, the admiralty ſhall have cognizance (28).

On the authority of this ſtatute, and of a number of ancient records and decided caſes, the common lawyers hold, that by the ſea is meant that part of the water which is below low water-mark when the tide is out, and up to high water-mark when the tide is in, for ſuch I take to be the

(28) The ſtatutes 13 Richard II. and 2 Henry IV. will be mentioned in their proper place: they are not introduced here, becauſe they do not go to ſhew or point out the legal limits of the ſea.

meaning of the words, *infra fluxum & refluxum maris*; and accordingly Lord Coke (29) ſays, "It has been reſolved by the whole court, that "the ſoil upon which the ſea doth ebb and flow, "to wit, between the high water-mark and the "low water-mark, may be parcel of a manor of a "ſubject; and when the ſea doth flow unto the "full height, the admiral ſhall have juriſdiction "of any thing whatſoever done upon the water, "between the high water-mark and the low "water-mark; but of every thing done upon the "ground when the water is returned, the common "law ſhall have juriſdiction; ſo that between the "high water-mark and the low water-mark, the "common law and the admiralty ſhall have ſeve-
* "rally power, interchangeable as aforeſaid."

The civilians have ſtrenuouſly contended, on the other ſide (30), that ports, creeks, and havens, are within the admiralty juriſdiction, and that *infra primos pontes* in the ſtatute 15 Rich. II. cap. 3. are words to be underſtood literally, while their opponents try to exchange them for *points*, or head-lands, and for *ports*. I am free to own, that in my opinion the common lawyers are clearly right on the whole of this controverſy as to the words of the ſtatutes (31).

(29) See Sir Henry Conſtable's caſe; Dyer, 326; and Lacy's caſe, Trin. 25. Eliz. and Exton, p. 136.

(30) See Godolphin, Exton, Jenkins, paſſim.

(31) Sir L. Jenkins admits that the river of Thames, below bridge, viz. at Graveſend, is within the body of the county.

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In Moor, 892, a caſe which, however, ſpeaks particularly of torts, it is ſaid the coaſts, ſhores, and harbours, are out of the power of the admiral, ſave in two caſes reſerved by the ſtatute of 15 Rich. II. one of death or mayhem below the bridges, the other of ſeizing a ſhip for the king's ſervices. "*Infra primos pontes* is to be "underſtood only of death or mayhem, not of "actions," ſays Hobart, 213.

The miſchiefs of this triumph of the municipal code in excluding the admiral from his claims to authority in rivers and harbours, are even greater than thoſe which ariſe from the excluſion of marine contracts made upon the land; and I truſt enough has been ſaid to ſhew the unreaſonableneſs of theſe limitations and controuls.—It is very obſervable, that the prize acts ſpeak of the admiral's juriſdiction in rivers, creeks, and havens.

But when we read the ſtatute of 15 Rich. II. above mentioned, and reflect that it was preceded by the ſtatute 13 Rich. II. ch. 5. ſaying that the admirals or their deputies ſhall not meddle with any thing done within the realm, but only upon the ſea, and followed by the ſtatute 2 Henry IV. cap. 11. (32), giving an action with double damages to the party grieved by proſecuting in the admiralty againſt the form of ſaid ſtatutes, with ten pounds forfeiture to the king; and the ſtatute

(32) The ſtatutes of Richard II. and Hen. IV. are made law in Ireland, by Poyning's famous act.

27 Eliz. cap. 11, enacting, that all and every of the offences therein mentioned, as thereafter ſhould be done *upon the main ſea*, or *coaſts of the ſea*, being no part of any county, and out of any haven or pier, ſhall be tried before the lord high admiral; and that the language of theſe ſtatutes, though they relate principally to torts, is underſtood literally by Lord Coke and Mr. Juſtice Blackſtone, and applied to all caſes, I have been forced to ſubmit to, and to adopt, the rule laid down by theſe great authorities, that contracts cognizable in the admiralty muſt be made upon the ſea.—I proceed now to our ſecond rule, viz. that—

Contracts cognizable in the admiralty muſt be founded in maritime ſervice or conſideration.

Though, by the former general rule, contracts cognizable in the admiralty muſt be made upon the ſea, it does not follow that this court hath power over all contracts there made. If not relative in any degree to maritime affairs, nor founded on maritime ſervice or conſideration, they come not within its ſphere. This has been already exemplified by Bridgeman's caſe, where the captain of a ſhip ſeems to have borrowed money from a paſſenger on his own private account, and not for the purpoſes of the ſhip:—ſo if, on an Eaſt India voyage, one paſſenger ſhould agree that his daughter ſhould be married to the ſon of another paſſenger, and thereupon marriage articles or ſettle-

ments were drawn, no man pretends that any queſtion ariſing upon their conſtruction would be triable in the admiralty; and thus we find, on a *common* ſale or mortgage of a ſhip at ſea, *trover* is the remedy (33).

Here this court willingly concedes to reaſon, and the common lawyers eagerly accept the conceſſion, and admit, when it makes for them, that locality is no criterion; but when reaſon commands to invert the rule, and thereby extend it to contracts really marine, though made upon land, they refuſe to obey. This obſtinate refuſal of equal juſtice hath been ſo much dwelt upon under the former head, that the reader muſt not be detained with further animadverſion.

But what ſhall we ſay to this further encroachment, which I cannot help noticing once more, that the maſter ſhould not ſue in the admiralty for his wages? His contract is marine, his ſervice is maritime. Is the refuſal of this ſhort and eaſy remedy to him, becauſe his contract is made upon the land? Why, then, if he dies at ſea, is it extended to his ſucceſſor, the hæres neceſſarius, whoſe contract, either expreſs or implied, muſt ariſe upon that element? Is it becauſe he reſts upon the credit of the owners, not of the ſhip? Is the principle of prohibition this then, not that the power over all contracts made at land, but over all contracts not attaching *in rem*, is forbid-

(33) Atkinſon *v.* Maling, 2 Term Rep. p. 462.

den to the admiralty? This is not ſaid in any book that I recollect. What reaſon can be given why he ſhould not go upon the maritime ſervice, and give the contract in evidence, as much as the ſailors? Or why he ſhould not, if refuſed payment of his wages by the owners, have the ſhip for his ſecurity as well as they? What ſtable diſtinction of juriſdictions can ever here be found, but in the internal nature of the agreement to be enforced?

Contracts cognizable in the admiralty muſt not be under ſeal. See Menetone 3 T R 269

This rule has been laid down too univerſally to be controverted, from Bridgeman's caſe down to that of Howe v. Napier. And hence, in obedience to this rule, and to avoid the riſk of a prohibition, ſtipulations in the admiralty of England are not taken under ſeal: yet in that of Ireland they are. And here let us obſerve how, upon occaſion, common ſenſe will get the better of technical rules. In the caſe of Menetone v. Gibbons, the hypothecation bond was under ſeal, and the objection was made; but the court ſaid that this rule could not be extended to a caſe where, from the nature of the contract, the proceedings were confined to the thing in ſpecie, over which the court of admiralty has the ſole juriſdiction, and that, in the caſe before them, the party could have no remedy in a court of common law; for the contract was merely in

rem, and there was no perſonal covenant for the payment of the money.

But this is not quite conformable to the ground upon which the rule was originally made, which was, that the civilians had different rules for conſtruing deeds from the common law, and required a different number of witneſſes to prove it; and, therefore, in Howe *v.* Napier, it was held, that any contract of the ſailors, though not under ſeal, if ſpecially or unuſually worded, was triable only at the common law.

From this extended idea of the rule aroſe the controverſy about ſtipulations, which, if it had terminated otherwiſe than it did, would have nearly extinguiſhed the admiralty juriſdiction. Lord Coke had declared his opinion that they could not be taken (34); and the common lawyers perpetually confounded them with recognizances, and even after the revolution a prohibition was granted againſt proceeding on ſuch a ſtipulation (35); nor was it until the middle of the reign of Queen Anne (36) that a reſtriction, ſo totally deſtructive of the very exiſtence of the court, was totally given up by the courts of law.

In fact, in former times the admiralty had been in the practice of taking recognizances like the courts of record, which produced ſo many prohibitions; and it was at one time a great ſubject of

(34) 4 Inſt. 135.—(35) Knight *v.* Perry, Comberbach, 109.
(36) Degrave *v.* Hedges, 2 Lord Raymond, 1285.

complaint, and was declared illegal by all the judges (37). In conſequence of that reſolution, it ſhould ſeem that the court of admiralty had adopted the ſtipulation now in uſe, which is ſufficiently diſtinguiſhed from a recognizance taken in a court of record (38), and which the courts of common law, from a conviction that ſomething of the kind was abſolutely neceſſary to maintain the admiralty juriſdiction, at length approved of in Par v. Evans, 15 Car. II. (39). The very ground of its juriſdiction appears from this inſtrument to be the conſent of the party; and though it ſubjects his perſon and goods, it does not enable the admiralty to iſſue proceſs againſt his lands.

Contracts operating ſolely in rem *are eſpecially and peculiarly within the province of the admiralty.*

The reaſon is, that this court proceeds in rem, whereas the common law can only proceed againſt the parties; thus in the caſe of hypothecation, the parties are not perſonally bound, the proceeding is confined to the thing in ſpecie, and therefore there is no remedy againſt the parties, and conſequently none at the common law (40).

(37) 4 Inſt. 135.

(38) This is the language in Smart *v.* Wolff, 3 Term Reports, p. 337.

(39) Sir Thomas Raymond, 78. 1 Keble, 489—500. 515, &c.

(40) See the words of Lord Kenyon and Mr. Juſtice Buller in Menetone *v.* Gibbons, 3 Term Reports, 269 and 270.

This remedy in rem againſt the ſhip or goods is founded on the practice of the civil law, which gives an *actio in rem* (41), to recover or obtain the thing itſelf, the actual ſpecific poſſeſſion of it; whereas, with us, things perſonal are looked upon by the law as of a nature ſo tranſitory and periſhable, that it is for the moſt part impoſſible either to aſcertain their identity, or to deliver them in their original condition; and, therefore, the law contents itſelf with reſtoring, not the thing itſelf, but a pecuniary equivalent in damages.—3 Blackſtone's Comm. 146.

It may be aſked, perhaps, Do not the actions of *detinue* and *replevyn* reſtore the ſpecific poſſeſſion of the *res* to its proper owner? True; but this is reſtoration, and to the owner. Previous property is neceſſary in the plaintiff ſuing for poſſeſſion; and if the defendant ſets up property in himſelf, or in another, and proves it, the plaintiff is defeated. But the admiralty juriſdiction gives this remedy *in rem* to the perſon having only an hypothecatory right, as in the caſe of ſeamens wages.

(41) Though this is ſometimes called actio realis, how entirely it differs from our real actions has been ſhewn in the view of the civil law in the former volume.

Whether there perſonal contracts, if maritime, are cognizable in the admiralty.

Reaſon would inſtantly determine this queſtion affirmatively; though, if the juriſdiction of the admiralty court is to be ſtrictly and literally confined to contracts made upon the land, this queſtion is of little importance, becauſe it can ſcarcely happen that ſuch a contract ſhould be made on the middle of the ocean, or that there ſhould be any occaſion for there forming it. But the courts of common law have, by prohibitions not founded in any ſyſtem, nor fraught with any conſiſtency, involved the ſubject in endleſs perplexity. They have allowed ſuits on perſonal contracts in this court, though made upon land, in various inſtances, and yet prohibited them in others not varied by any circumſtance authorizing ſuch a diverſity of deciſion.

The general rule however at preſent is, that the admiralty acts only *in rem*, and that no perſon can be ſubject to that juriſdiction but by his conſent, expreſſed by his entering into a ſtipulation. Thus it is expreſsly ſaid in Keble's Reports (42), that without a ſtipulation the admiralty has no juriſdiction at all over the perſon; and it has been added, that the conſent of the common law courts to its taking this ſecurity was given, though un-

(42) Page 500.

willingly, from their ſenſe of its abſolute neceſſity to bind the perſon. Thus again it is ſaid, in Godbolt (43), that the firſt proceſs in the admiralty is againſt the ſhip and goods, and that the libel muſt not be againſt the perſon.

And Mr. Juſtice Buller has obſerved (when giving a reaſon why the admiralty ſhould be allowed to proceed on an hypothecation bond ſealed abroad, becauſe the common law could give no remedy, there being no perſonal covenant for the payment of the money), that in the ſtruggles between the court of admiralty and common law courts reſpecting the extent of their reſpective juriſdictions, the latter have ſaid, that if the parties have *bound* themſelves to anſwer *perſonally*, the former cannot take cognizance of the queſtion; and in a ſuit in the admiralty by one part-owner to oblige another to ſell a ſhip, Chief Juſtice Lee ſaid (on an application for a prohibition), that court has no ſuch power, for that would be proceeding *in perſonam* (44).

In the caſe of Smart *v.* Wolff (45), which was, it is true, an application for a prohibition to the prize court, but the reaſoning in which applies equally to the inſtance court, a captured ſhip had been reſtored as a neutral, but the goods had been condemned as prize, and delivered to the captors. The maſter of the captured ſhip, or his agent on his behalf, inſtituted a ſuit in the admiralty againſt

(43) Page 64. (44) 1 Wilſon, 100. (45) 3 T. Rep. 323.

the owners, or agents of the owners of the capturing privateer, to bring into court the produce of the goods remaining in their hands to anſwer his freight.

No fidejuſſory caution had been taken before the goods were delivered to the captor, but the queſtion of freight had been reſerved by the terms of the decree for further conſideration. A prohibition was applied for.

For the prohibition it was inſiſted, that after the delivery of *the thing* itſelf, the juriſdiction of the admiralty ceaſes, unleſs it be prolonged by the conſent of the party, and his entering into a ſtipulation. That this court has no hold upon the party except by conſent. That it has always been admitted by civilians, as well as common lawyers, that the admiralty has no juriſdiction where the thing itſelf is out of their cuſtody.

On the other ſide it was ſaid, that the prize court has juriſdiction over every perſon who obtains poſſeſſion of the proceeds of a prize, and that there was a material diſtinction in this reſpect between the inſtance and prize court; the former proceeds originally by arreſt, in order to compel bail to be given to ſubmit to its juriſdiction: but the juriſdiction of the prize court is founded on a higher authority, it is founded on the right to enforce the law of nations.

The court obſerved, that the ſuggeſtion ſuppoſed that the monition iſſued againſt the defendants, as owners of the privateer, or agents for her captain.

—No ſuch thing, the proceedings were founded on the plaintiff's having poſſeſſion of the proceedings; if they had not then ſuch poſſeſſion, the court admits they could not be ſued, and were not *perſonally* liable. The ſuit was *quaſi in rem.*

In conſequence of theſe and ſimilar poſitions maintained in the common law courts, the admiralty has in a great meaſure dropped its claim to taking cognizance of charter-party and freight, and ſuits by material men, and almoſt all other proceedings upon contract, except thoſe for recovery of ſeamens wages, or enforcing bottomry bonds. Let us now ſee how far this reſtriction is conſonant to reaſon, and whether this mode of interference by the law courts can be reduced to any rule or to any conſiſtency.

Every argument which has been uſed for extending the juriſdiction of the court of admiralty to contracts in their nature maritime, though made upon the land, applies to them alſo though affecting the perſon; the principle of juriſdiction ought not to depend upon locality, nor upon the *object* affected, but upon the *ſubject* matter of the contract. I cannot expreſs my idea more clearly, though conciſely, as to the reaſon of the thing, upon which longer to dwell would be only to repeat arguments already urged, though with a different aſpect.

The oppoſition of the law courts to this principle is here as it was with reſpect to locality, not only irrational, but inconſiſtent. They ſuffer

ſeamen every day to proceed, not merely againſt the ſhip, but againſt the maſter and the owner. Upon what ground? Is it not on their perſonal contracts expreſſed or implied? Do they ſay that here, as before with reſpect to locality, that limits are paſſed from peculiar indulgence to ſeamen, and that *communis error facit jus;* we anſwer as before, that no error can make law; and we aſk, as formerly, why then in conſiſtency is not the ſame indulgence extended to the maſter, in a ſuit againſt the owner; and to the mate becoming maſter, whoſe contract, as well as ſervice, are on the ſea?

The maſter cannot ſue in the admiralty, becauſe he is ſuppoſed to ſtand on the perſonal credit of the owner, not relating to the bottom of the ſhip (46); on what other footing doth the ſailor ſtand, if the ſhip and cargo are gone, as we will ſuppoſe ſent away upon another voyage before he could arreſt her, or ſtolen away and the goods embezzled by the maſter who flies? The owner cannot even be pretended to have any of the proceeds in his hands (47). Yet that the ſailor hath

(46) This is ſaid in a thouſand caſes. See 2d Robinſon, p. 23.

(47) The words of the text are guarded, becauſe it may be ſaid, if the ſhip be loſt ſo are the wages, and if the owner be ſuable it is not perſonally, but as having the freight and proceeds in his hands. If it be anſwered, that the owner is ſued, becauſe he ought to have the proceeds in his hands, and is anſwerable for employing a fraudulent maſter, and

his triple remedy againſt ſhip, maſter, or owner, is never diſputed.

To complete the confuſion in which this ſubject hath been involved, the court of admiralty is permitted to arreſt the perſon in ſome inſtances of perſonal contract, to compel a ſtipulation on which its juriſdiction is to be founded.

When the old doctrines and proceſs of the civil law were followed, as they were when Clarke wrote his practice, and even in the time of Sir L. Jenkins, this was intelligible; the party was arreſted to compel an appearance, but if he obſtinately refuſed to appear, though the court might not be able to proceed to definitive ſentence (48), it proceeded for defaults againſt all or any part of his property, at leaſt againſt his goods; but this did not imply want of juriſdiction, any more than the old common law proceſs by ſummons and diſtreſs infinite, or the

that it is a proceeding *quaſi in rem*, and not charging him perſonally, this is rather too ſubtle for common comprehenſion.

(48) This ſhall be fully explained when we come to ſpeak of practice. Clarke ſeems even to imply, that a final ſentence may be had; for he ſays, "the party ſhall be im-"priſoned pendente lite." If the admiralty will ſupport a quantum meruit, or ſomething analogous to that legal count, for ſome ſervices done upon the ſea: I ſay, if this may be done in one caſe, why not in all, to be conſiſtent? In the caſe of the Favourite, 2 Robinſon, p. 232, the mate ſucceeding to the office of maſter, was allowed to ſue as mate during the whole time.

preſent admiralty proceſs *in rem*, for defaults, implies want of juriſdiction. But now it doth not appear intelligible, in caſes of perſonal contract, upon what ground the perſon, though it may be taken for a contempt in not appearing, is detained, for refuſing to enter into a ſtipulation to ſubmit to a court, which hath no previous juriſdiction to try perſonal contracts till that ſtipulation be entered into. Yet this is the caſe of maſter or owner, where the ſhip cannot be had. Without his conſent he may be arreſted, and if he will not enter into a ſtipulation to ſubmit to the juriſdiction, impriſoned while he lives for breach of a perſonal contract expreſſed or implied, and yet the admiralty court has not juriſdiction over perſonal contracts. Who can reconcile theſe diſcrepancies?

The preſent practice on this point we muſt acknowledge is, that no ſuit has been brought on any perſonal contract for very many years paſt. This is ſaid on the ſpecial authority of a gentleman who was very eminent as regiſtrar, added to the general enquiries of the author. Yet even where proceedings cannot be had againſt the perſon originally, they may againſt the perſon as having the proceeds of the ſhip or cargo in his hands, for this in fact is *in rem*, as in the caſe above-mentioned of Smart and Wolff; yet even ſo the *maſter* is not permitted to ſue againſt proceeds in the regiſtry. 2 Robinſon, p. 239.

To ſum up all that has been ſaid on contracts,

it has been delivered as my humble opinion, that the only method of forming any rational or conſiſtent ſyſtem on the extent and limits of the admiralty juriſdiction over contracts, and of getting rid of all the contradictions and inconſiſtencies in the books, would be by adopting univerſally, the rule applied in the two memorable inſtances of Howe and Napier, and Menetone and Gibbons, that the ſubject matter, and not locality, ſhould here determine the juriſdiction; and I have been unwillingly forced to ſubmit to authority, in allowing that beſides marine ſervice, or maritime conſideration, execution or making on the ſea, and the abſence of a ſeal, and operation in rem are neceſſary in contracts, to found the juriſdiction of the admiralty, which is excluded from trying them if perſonal, or ſealed, or made on land.

I ſhall conclude this head of contracts with the two following general rules: Where the admiralty court hath not original juriſdiction of the cauſe, though there ſhould ariſe in it a queſtion that is proper for the cognizance of that court, yet that doth not alter nor take away the excluſive juriſdiction of the common law. And *vice verſa*, if it hath juriſdiction of the original, it hath alſo of all incident or conſequential queſtions, though properly determinable at common law.

TORTS.

We proceed in the next place to conſider the juriſdiction of the inſtance court as to torts; that

is, as to *private* wrongs, for *public* will come under our conſideration when treating of the criminal court.

Private wrongs may be either to the perſon or the property; though no doubt was ever entertained as to the power of the admiralty to puniſh criminally wrongs to the perſon, as aſſaults, batteries, falſe impriſonments committed on the high ſeas. Whether the admiralty hath now any criminal juriſdiction, except under the ſtatute of Henry VIII. and whether its old powers *quo ad hoc* be obſolete, will be conſidered hereafter in cap. 11th. Yet difficulties have been ſtarted as to their power of giving damages or compenſation *civiliter* for ſuch like injuries. Theſe difficulties ſeem to be overcome and anſwered by the following caſes amongſt others.

In a caſe mentioned in the letters of Sir L. Jenkins, where a veſſel had by violence been forced out of its courſe, that learned judge declares, in reply to queries from the lords of the admiralty, that the perſons on board may maintain in that court what he calls an action of damage, for their loſs of time, and other injury done them (49).

In Caton and Burton, Cowper, 330, a ſuit appears to have been inſtituted in the admiralty for an alleged aſſault on the high ſea, and only prohibited becauſe it appeared to have been committed not at ſea, but infra corpus comitatus.

(49) Sir L. Jenkins, Vol. II. p. 774.

In the caſe of Le Caux and Eden, this queſtion was diſcuſſed incidentally. The queſtion there was, whether an action at common law could be maintained for an impriſonment on a capture at ſea, *as prize?* and it was determined that it could. In the courſe of the argument it was ſtrongly urged for the action, that there was no remedy in the court of admiralty, and that no inſtance could be adduced where that court had taken upon itſelf to aſſeſs damages for aſſaults, impriſonment, or any injury done to the perſon; and it was aſked how they could without the intervention of a jury.

On the other ſide it was inſiſted, that though perhaps no diſtinct caſe could be mentioned of damages aſſeſſed in that court, *eo nomine*, for perſonal injuries, yet the ſtanding interrogatories ſhew, that in anſwering them, any perſonal injury may be ſtated, and quereles upon the ſea, 4th Inſtitute, p. 134. ſeem to include perſonal treſpaſſes, and 1 Roll. 250, was appealed to.

Mr. Juſtice Willes ſaid, "he ſaw no reaſon "why the admiralty might not judge of injuries "to *perſon* as well as to *property*, and aſcertain "damages by reference to the regiſtrar, who can "call in aſſeſſors (50)."

It may perhaps be ſaid, that in the laſt caſe the injury was triable as incident to a queſtion

(50) The civil law, even in civil caſes, was not altogether deſtitute of the aid of a jury, though not by that name.

of prize, but the reaſoning is general, that the admiralty can aſſeſs damages; and Mr. Juſtice Blackſtone is clearly of opinion, that *injuries* committed on the high ſea, are only to be remedied, to uſe his words, in this peculiar court of their own (51).

Accordingly, actions for damage done by aſſaulting the perſon, are extremely frequent in the inſtance court of admiralty, and have been ſo from time immemorial, as we ſee in the Liber Niger of the admiralty; ſuch injuries are alſo puniſhable criminaliter, by another branch of the ſame court, viz. by diſcretionary fine (52).

We may therefore hold it as ruled, that civil or private injuries to the perſon, committed on the ſeas, are remediable in this court; but here, and in all matters of tort, locality is the ſtrict limit. There can be no variety in the ſubject matter of torts. They cannot, like contracts, relate ſome to terrene, ſome to marine affairs.—Nor have a double aſpect like them, which, though made on land, may relate entirely to the ſea. Treaſon, murder, battery on the water, muſt be the ſame in their nature and in their puniſhment, whether committed by land or by water. All that we have ſaid, therefore, of the ſubject matter being the proper criterion of juriſdiction, related only to *contracts*. In *torts*, locality aſcertains the judicial power.

(51) 3 Black. Com. p. 106.

(52) See 27th article Magiſtri Roughton.

Injuries to property committed on the ſea now claim our attention. They may conſiſt either in damage or in aſportation; in deſtroying or leſſening the value of the property, or in taking it away.

The inſtance of damage to the property, on which caſes moſt frequently occur, is that of colliſion, or ſhips running foul of one another, by which one or both are ſunk or battered.

For this damage, if done at ſea, remedy may be had in the admiralty, but not if it happen within the body of a county. That in the laſt caſe prohibition would go, is ruled from the caſe of Violet and Blague, Moor 891, down to Velthaſon *v.* Ormſby, 2d Term Reports, p. 315 (53): but *reſcue* of a ſhip in a county (previouſly and rightly arreſted by admiralty proceſs) is cognizable there. Rigden *v.* Hedges, 1 Lord Raymond, 446.

In the caſe above mentioned from Moor, which ſpeaks of torts, it is ſaid, the coaſts, ſhores, and harbours, are out of the power of the admiral, ſave in two caſes reſerved by the Stat. 15. Richard II. one of death or mayhem below the bridges; tho

(53) The miſchief done by this determination on the river Thames is inconceivable. Suppoſe the damage done by a foreign ſhip. The admiralty is not permitted to arreſt her. The law courts have no ſuch proceſs. The owner lives abroad. The captain inſtantly ſails away. We are not on a par with foreigners, for they, in every country of the continent of Europe, would inſtantly ſeize one of our ſhips for a ſimilar offence.

other of ſeizing a ſhip for the king's ſervice; and yet the prize acts, and even that of 1793, ſpeak of the admiral's juriſdiction in creeks, rivers, and havens.

Whether in ſuch caſe the courts of common law have a concurrent juriſdiction (54), may have been doubted, but I think it is clearly ſettled in practice that they have, where the proceeding is not in rem, but merely for damages; though Sir Leoline Jenkins expreſsly ſays, that to bring an action of trover for a tort upon the high ſeas, is an invaſion of the authority of the admiralty; and alleging, that cauſes of ſpoil are cognizable in the admiralty, adds, that it has always been ſo till ſome late interruption, and that it is not without ſpecial caſe and ſatisfaction to a foreign plaintiff, that he ſhall have the benefit of the ſame marine laws here, that we are judged by in his country; and inſtead of entering as many actions of trover and converſion as there are parties to the ſpoil, and proprietors of the ſhip and goods, which might be one hundred actions at common law, the maſter, in the name of himſelf, his ſetters out and freighters, need enter only one ſingle action in the admiralty, where one hearing, plea, trial, and one ſentence (as well in vacation as in term time) will determine the whole affair. 2 vol. 764.

(54) In Addiſon *v.* Overend, 6 Term Reports, p. 766, Treſpaſs was brought for running down the plaintiff's ſhip, but it is not ſaid whether it happened in port or at ſea.

As to the aſportation, or any actual poſſeſſion of the ſhip of another obtained upon the high ſeas, if felonice or piratice, it is a public crime which will come under our conſideration when treating of the criminal court—if it has been in conſequence of a taking *as prize*, though the ſhip, from want of legal condemnation, has not become a real and complete prize, I conceive that any claim of reſtitution muſt be brought in the prize court, and doth not at preſent come within our view, though it ſhall hereafter. If we conceive an illegal poſſeſſion obtained of the ſhip in any other way (55), a ſuit for reſtitution is proper in the inſtance court.

It is not eaſy, indeed, to conceive ſuch a caſe, unconnected with either piracy or capture in war, though it hath not been unuſual, where a Britiſh prize has been ſold abroad and afterwards has made a voyage into this country, for the former owner, claiming jure poſtliminii, to libel in the court of admiralty, (particularly in Ire-

(55) An inſtance of this occurred in Graves *v.* Sawear, Sir T. Raymond, 15, where the plaintiff was owner of one part of a ſhip, the defendant of another part; and the defendant fraudulently carried the ſhip, *ad loca tranſmarina*, and diſpoſed of her to his own uſe. The ſhip being gone, there was no proceeding in rem. An action on the caſe was brought. The plaintiff failed becauſe the parties were tenants in common. Query, Whether in ſuch caſe the defendant might not have been ſued in the admiralty, as having the proceeds in his hands?

land where there is no prize court,) as for an illegal taking at ſea, dropping the mention of prize and capture altogether; ſo as to make it on the face of the libel, before an exception to the juriſdiction comes in, appear like a caſe for the inſtance court (56). We may, however, ſuppoſe or imagine a caſe of poſſeſſion unlawfully taken, where no circumſtance of capture in war was concerned, as if there was a diſputed property in a ſhip, and one of the claimants prevailed upon the maſter at ſea to betray to him the poſſeſſion previouſly held by the other. In ſuch a caſe, a ſuit by the latter in the admiralty for reſtitution, would be fit and proper *omnibus numeris*.

Such a ſuit formerly was either petitory or poſſeſſory (57), claiming the right of property,

(56) Some very able men think indeed that ſuch would be a caſe for the inſtance court, and that the queſtion of prize comes in only incidentally; but ſurely taking *as* prize, though illegally, or purchaſing from ſuch a taker, is equally a queſtion for the prize court, as legal capture and purchaſe thereof; and accordingly the caſe of the Perſeverance Pittar, in 2d Robinſon's Reports, which was of the former kind, was tried in the prize court. See alſo the caſe of the Flad Owen, 1 Rob. 135, and of the Kierlighett, 3 Rob. 96.

(57) See a poſſeſſory ſuit in the admiralty, mentioned in Strange, 936, and a petitory, 1 Shower, 179. Theſe diſtinctions, well known to our, and to all laws, becauſe founded in the nature of things, will be more fully and properly explained when we come to treat of *practice*. A ſuit by owners for ſeizing or taking a ſhip is now always poſſeſſory.

or the right of poſſeſſion, or both might be united; in which caſe, the promoveat having proved in the firſt inſtance an unjuſt invaſion of his poſſeſſory right, might have the poſſeſſion reſtored to him immediately by an intermediate incidental poſſeſſory decree, like the *lis vindiciarum* of the civil law, the right of property to abide the ultimate event of the ſuit; or the defendant, in anſwer to the claim of property, might ſet up a claim of poſſeſſion, to which the other may reply, that it was by violence.

But for a very conſiderable time paſt, and even as far back as a period not very long after the reſtoration, the court of admiralty was told by other courts, that it had not juriſdiction to examine and pronounce on *the title* of ſhips, in queſtions of *owner/hips*; ſince that time the court has been very cautious not to interfere at all in queſtions of this nature. But where the conſideration of property comes in incidentally, and in ſuch a manner as is not diſputed between the parties, the court doth judge, though the queſtion of property can hardly there be ſaid to be before it, but the ſuit always purports to be inſtituted in a poſſeſſory cauſe, civil and maritime.

Though ſuch ſuits for reſtitution be proper in the admiralty, yet it may well be aſked, whether the courts of common law have not here concurrent juriſdiction, for though the tort be committed upon the ſea, the main queſtion is a ſimple queſtion of poſſeſſory right between man and man,

and which in its nature favors not neceſſarily of a marine buſineſs (58).

Lord Mansfield has anſwered this queſtion in the caſe of Lindo and Rodney (59). "A thing," ſays he, "being done upon the high ſea, doth not exclude the juriſdiction of the courts of common law. For ſeizing, ſtopping, or taking a ſhip, upon the high ſea, *not as prize*, an action will lie; though for taking *as prize* no action will lie. The nature of the queſtion excludes not the locality."

The proper diſtinction ſeems to be, that if the ſuit be in rem, for the reſtitution of the ſhip itſelf, the ſuit ſhould be in the admiralty; if for damages only, at common law. But Sir L. Jenkins agrees with the attorney and ſolicitor-general of his time in opinion, that even for *ſpoil and damage*, and loſs of time or demurrage, occaſioned by violence, ſuits might be brought either in the courts of common law, or in the admiralty; but he adds weighty *reaſons* for preferring the latter. "Having," ſays he, "the authority of two ſuch eminent perſons in the law, that this cauſe of ſpoil is cognizable in the admiralty, I will only add, beſides, that it has been always ſo, till ſome late interruption; and that it is

(58) A mere diſpute about a ſhip doth not make a marine buſineſs. When a ſhip is mortgaged at home, or taken in execution by the ſheriff, we think of it merely as of any chattel, like a houſe.

(59) In a note, Douglas, 592.

" not without ſpecial eaſe and ſatisfaction to a " foreign plaintiff, that he ſhall have the benefit " of the ſame marine laws here, by which we are " judged in his country; and inſtead of entering " as many actions of trover and converſion, as " there are parties to the ſpoil, and proprietors " of the ſhip and goods, need enter but one ſingle " action in the admiralty (60)."

In many caſes of this kind an action of trover has been brought (61), and in others, the language of the court ſeems to imply, that this or replevyn was the more proper method (62).

If the taking be infra corpus com. of courſe the admiralty has no juriſdiction, and this was the caſe of Violet and Blague in Moor's Reports, in which a ſhip was taken poſſeſſion of at Limehouſe by a perſon claiming right thereto.

When formerly the admiralty was permitted to try petitory ſuits, or cauſes of property directly, it was held that the ſentence of the admiralty on

(60) Sir L. Jenkins, 2 Vol. 764 and 774.

(61) See Hughes and Cornelius. Sir T. Raymond, 473. and Skynner, p. 59. and alſo King and Broom, 12 Mod. p. 134. and Brown *v.* Franklyn Carthew. 474. and Violet and Blague. Moor, 891.

(62) See what Lord Holt ſays in Tremoulin and Sandes, 12 Mod. and 1 Ventris, p. 308. Other caſes on this ſubject are, Liſter and Baxter, Strange, 693; Johnſon and Stepney, Holt, p. 48; and 1 Shower, 178; Edmonſon and Walker.

the property of a ſhip taken upon the ſea was final, and it ſhould not be afterwards tried in trover (63).

Now ſuppoſe property thus illegally taken has been ſold in open market, it is ſaid that it doth not appertain to the admiralty to try the right of poſſeſſion of the ſhip, being ſold upon land (64); and an action has been brought for bringing ſuch a ſuit in the admiralty (65), and it has been ruled that this court cannot try a taking and converſion on land, following an illegal taking at ſea.

The ground of theſe determinations ſeems to be that where the admiralty has cognizance of the principal, it has alſo of the incident; yet that is only where the whole makes one *continued* act, and here the purchaſe is *ſevered* from the firſt taking, and it becomes a mere queſtion of property on land. But this ſeems ſubtilty; the ſale is ſurely a continuation of the violence, and as we ſee that in the prize court the validity of ſuch a ſale after a capture in war would be tried as inſeparable from the prize queſtion, why ſhould not the ſame rule apply in the inſtance court to takings, not by an enemy.

I conclude by conſidering the juriſdiction of this court as to foreign ſhips, and foreigners, and by adding one obſervation more on the inconveniencies ariſing from reſtraining its juriſdic-

(63) 3 Mod. 194. (64) 1 Croke, 685. anonymous.
(65) Radley *v.* Eggleſield, 1 Ventris, 173.

tion, not only on the land, but even over things landed.

It doth not ſeem poſſible to draw an exact line about the juriſdiction which this court will exerciſe as to foreigners. It muſt depend on the nature of the queſtion. If it ariſes from the particular inſtitutions of any country, to be applied, and conſtrued, and explained, by the particular rules of that country, it will not be entertained. Such is a queſtion ariſing upon the contracts of mariners (66), who will be remitted to their own forum.

But where the queſtion is one of the *jus gentium*, to be determined by ſound diſcretion, acting upon general principles, the court will hold plea of it; and ſuch that of ſalvage ſeems to be, according to the inclination of the mind of the court in a late caſe. It is ſaid alſo, that ſuits on bottomry have been often entertained in this court between an Engliſhman and a foreigner, or between two foreigners.

I have already expatiated on the evils ariſing from confining the admiralty civil juriſdiction literally to the ſea; but what pretence can be offered, when it has obtained juriſdiction, for eluding it by a fraudulent landing of the things in queſtion? Yet ſuch tricks have frequently been attempted as to wreck, derelict, &c. the parties

(66) Another reaſon alſo has been given, becauſe the contract for wages cannot be the ſubject of a ſuit till the return or end of the voyage.

being amuſed with negociation till the things were landed; though it is reaſonable to hope that in ſuch caſe, at leaſt, of manifeſt contrivance to evade ſubſtantial juſtice, no court of common law would uphold the fraudulent contriver (67).

The laſt branch of juriſdiction I ſhall mention is, that of enforcing the judgments of foreign courts.

One judge muſt not refuſe, on letters of requeſt, to execute the ſentence of another foreign judge, when the perſons or goods ſentenced are within his juriſdiction; and if he do, his ſuperior muſt compel him to it, otherwiſe it is a ſufficient ground for repriſals. He may, however, on account of what he judges to be nullities, ſuſpend execution if he ſees cauſe, but he muſt not pronounce upon thoſe nullities, nor upon the merits of the principal cauſe (68).

That a ſentence of the admiralty in *partibus tranſmarinis*, may be executed by the admiralty here upon the receipt of letters miſſive for that purpoſe, has been ruled in various caſes, and alſo that the party may be impriſoned here by proceſs of the admiralty in execution of a foreign ſentence, and is not entitled to an habeas corpus (69.)

(67) Among ſmaller powers in this court given by ſtatute, is one to licence cutters, &c. to eſcape the penalties of the hovering acts. See 24 Geo. II. and 38 Geo. III. ch. 33.

(68) Sir L. Jenkins, 2d vol. p. 762.

(69) 1 Roll. 530. 1 Ventris, 32. 2 Levynz 267.

And though the ſentence of the admiralty *in partibus tranſmarinis* was for a matter upon land, yet a prohibition doth not go to the admiralty here which executes ſuch ſentence, if nothing further is done, for the court will give credit to the ſentence there (70); as if a foreign admiralty adjudge a ſhip to be a prize, after a ſale here upon land, a prohibition ſhall not go, for it is only an execution of the ſentence which adjudged it to be a prize. But if there be a ſuit in the admiralty to execute a ſentence in a foreign court, not final, a prohibition will go (71).

The ſentence of a foreign court of admiralty is only concluſive as to the expreſs grounds of ſentence, and not as to any of the premiſes, which might have led to the adjudication (72).

A ſentence in a foreign court of admiralty condemning a neutral ſhip as navigating contrary to the ordinances of a belligerent ſtate, to which ordinances that neutral power had not aſſented, has been ruled not to falſify a warranty of neutrality in a policy of inſurance (73).

The reſult of our enquiries in the preſent chapter, as to the extent of juriſdiction in the inſtance court of admiralty, which is at preſent ſeemingly allowed by the law courts, is, that it is

(70) Raymond, 473. 1 Leonard, 267.

(71) Jurado *v.* Gregory, in Ventris.

(72) Chriſtie *v.* Suretan, 39 Geo. III.

(73) Pollard *v.* Bell, 40 Geo. III.

confined in matters of contract to ſuits for ſeamens wages, or thoſe on hypothecations; in matters of tort to actions for aſſault, colliſion, and ſpoil; and in quaſi contracts to actions by part owners for ſecurity, and actions of ſalvage; but if a party inſtitute a ſuit in that court on a charter-party, for freight (74), in a cauſe of average and contribution, or to decide the property of a ſhip, and be not prohibited, I do not ſee how the court could refuſe to entertain it; and I have ſome reaſon to think that this my opinion is ſupported by very high authority.

(74) There was, ſo lately as in 1764, a ſuit for freight, Hayes v. Giovanni, in the vice-admiralty court of Gibraltar, and to this day in Ireland, ſuits on charter parties, and by material men, are often brought, and no prohibition.

CHAPTER V.

ON THE LAW OF THE INSTANCE COURT.

THE law which governs the inſtance court will be moſt conveniently viewed in its application to the ſubjects there cognizable, which are principally the regulations of ſhipping, the powers, duties, and rights, of the perſons concerned or employed in the ſame, viz. owners, maſters, and mariners; the contracts entered into by or with theſe perſons; and the torts committed by or upon them, or the damage done to the ſhip.

In giving a ſketch of this law, one manifeſt difficulty occurs of no ſmall magnitude. Britain never has, like France, collected into one ſingle grand ordinance its civil marine law. I term it civil, to diſtinguiſh it from the prize law or code of war. The former, therefore, muſt be gleaned from its diſperſed ſtatutes; and where they are ſilent, from the old maritime laws of other countries, as far as they have been received in this; how far they have been ſo received can only be aſcertained by determined caſes; and where they are wanting,

a commentator can only give thoſe parts of the ancient maritime law which appear ſo conſonant to reaſon, that they undoubtedly would guide in caſes yet unſettled, or which from his own experience he knows to be uſually received as law.

Queſtions relative to the ſhip itſelf uſually occur incidentally in controverſies reſpecting contracts or torts, as, Whether ſhe has been properly regiſtered, and where? Whether ſhe has her proper papers, and whether ſhe be manned according to law? The law as to regiſtry, and the uſual and requiſite ſhip's papers, with the purport of the navigation act, ſhall here be mentioned. Other queſtions of leſs importance may be infinite, and refuſe enumeration.

It is very true, that a ſhip offending againſt the proviſions of the navigation act, and thereby liable to forfeiture, may be proceeded againſt by information; or by ſeizure and prevention, by the officers of the revenue; but theſe offences alſo come directly before the court of admiralty (1), by appeal from the vice-admiralty courts in the Weſt Indies on matters of revenue, and relating to the

(1) By the navigation act, all admirals and commanders of king's ſhips are authorized to ſeize and bring in, as prize, ſhips offending againſt that law, in the plantations in Aſia, Africa, or America, and to deliver them to the *court of admiralty*; and, in caſe of condemnation, one moiety of ſuch forfeiture is to go to the admiral or commander and his company, to be divided as prizes are; the other moiety to the king.

navigation acts. It will be every day found neceſſary for the practitioner in that court to have a general idea of them.

It is well known, that the jealouſy entertained by England of the Dutch carrying trade during the time of the uſurpation, which afterwards burſt out into a furious war in the reign of Charles II. was the origin of the famous navigation act, which originated in the former, and was ratified and improved in the latter period.

The principle and policy of this and ſubſequent acts were to encourage our own ſhipping, by providing that no goods or commodities of the growth, production, or manufacture of Aſia, Africa, or America, ſhould be imported into Great Britain in any other than in Britiſh built ſhips (2), or in Britiſh ſhips owned by his majeſty's ſubjects, and navigated by a maſter, and three-fourths at leaſt of the mariners, Britiſh ſubjects; and that ſuch goods or commodities ſhould not be ſhipped or brought from any other place or country, but only from thoſe of their growth, production, or

(2) It is remarkable, that in the ancient ſtatutes of the admiralty, in the black book, we find the principle of the navigation act.—"Inquiratur de his, qui conducunt et "onerant naves exteras ſive alienigenas, ubi poſſunt pro "rationabili ſalario conducere naves domini regis ſubdi-"torum: quia tenentur navigium generale iſtius regni ſpe-"cialiter manu tenere & ſuſtentare aliis navibus alieni-"genarum ſpretis & relictis; qui ſecus fecerint gravem "finem domino admirallo facient in haç parte."

manufacture, or from thoſe ports where they can only, or are, or uſually have been, firſt ſhipped for tranſportation; and that no European goods ſhould be imported but in ſuch ſhips, and ſo manned as above, unleſs in ſhips of the built of the country or place in Europe under the dominion of the ſovereign of the ſtate of which ſuch goods are the growth, production, or manufacture, or of the built of ſuch port where the ſaid goods can only be, or moſt uſually are ſhipped for tranſportation, and navigated by a maſter, and three-fourths at leaſt of the mariners, of that country, place, or port (3).

And with reſpect to the coaſting trade, the law is, that no perſon may lade or carry on board any ſhip or veſſel, other than a Britiſh ſhip owned by Britiſh ſubjects, and navigated by a maſter, and three-fourths at leaſt of the mariners, Britiſh ſubjects, any commodities or things, of what kind ſoever, from one port or creek of Great Britain or Ireland, or of the iſlands of Guernſey or Jerſey, to another port or creek of the ſame, or any of them.

The law, as above ſtated, makes it neceſſary to enquire what conſtitutes a Britiſh built ſhip, and what a Britiſh ſhip; and this is principally an-

(3) I have here given the general principle. The vaſt variety of exceptions, modifications, and additions to the original proviſions of the navigation act, muſt be ſought in works expreſsly and ſolely on the ſubject. Mr. Reeves's Law of Shipping forms an excellent epitome of them.

ſwered by ſtatute 26 Geo. III. ch. 60. A Britiſh *built* ſhip is ſuch as has been built in Great Britain or Ireland, Guernſey, Jerſey, or the Iſle of Man, or in ſome of the colonies, plantations, iſlands, or territories in Aſia, Africa, or America, which, at the time of building the ſhip, belonged to or were in the poſſeſſion of his majeſty; or any ſhip whatſoever which has been taken and condemned as lawful prize.

Except ſuch Britiſh built ſhips as ſhall be rebuilt or repaired in any foreign port or place, to an amount exceeding fifteen ſhillings per ton, unleſs ſuch repairs ſhall be proved to have been neceſſary to enable the ſhip to perform her voyage.

A Britiſh ſhip may be firſt, ſuch as is foreign built, and which before 1ſt May, 1786, belonged wholly to any of the people of Great Britain or Ireland, Guernſey, Jerſey, or the Iſle of Man, or of any colony, plantation, iſland, or territory in Aſia, Africa, or America, in poſſeſſion of his majeſty.

Secondly, ſuch as has been built or rebuilt on a foreign-made keel or bottom, and regiſtered before 1ſt May, 1786, as a Britiſh ſhip.

Thirdly, ſuch as had begun to be repaired or rebuilt on a foreign-made keel or bottom before 1ſt May, 1786, and has been ſince regiſtered, by order of the commiſſioners of the cuſtoms in England or in Scotland.

We next proceed to conſider the law as to regiſtry, which is, that every ſhip or veſſel having a deck, or being of the burthen of fifteen tons,

and belonging to a ſubject of Great Britain or Ireland, Guernſey, Jerſey, or the Iſle of Man, or any colony, plantation, iſland, or territory, to his majeſty belonging, muſt be regiſtered by the perſon claiming property therein, who is to obtain a certificate of ſuch regiſtry in the port to which the ſhip or veſſel properly belongs.

Without this certificate of regiſtry, the ſhip cannot be entitled to the privileges of a Britiſh built ſhip, but is liable to forfeiture; and her being the property of a Britiſh ſubject doth not prevent her being conſidered as an alien ſhip.

If a certificate of regiſtry be loſt or miſlaid, or if a ſhip ſhall be altered in form or burthen, or from any denomination of veſſel to another, ſhe muſt be regiſtered de novo, and a new certificate granted (4).—Prize ſhips are by ſtatute entitled to be regiſtered as Britiſh ſhips.

The 36 Geo. III. ch. 112, authorizes his majeſty to order the regiſtering of ſhips recaptured. The 37 Geo. III. ch. 63, grants to foreign ſhips, put under his majeſty's protection, the full privilege of prize ſhips as to regiſtry.

(4) On the principle of this proviſion, ſome tricks have been endeavoured to be founded, by adding ſome trifling repairs, and newly regiſtering ſhips taken as prize; and then, though no condemnation, inſiſting that the property is altered. Perhaps, in ſuch caſe, ſome allowance may be aſked from the original owners for the expence of repairs, but the ſhip muſt be reſtored.

The ſhip's papers with which we ought to be acquainted are chiefly theſe:—1ſt. A paſs or paſsport, if neceſſary, to prove neutrality. 2dly. The ſhip's regiſtry and certificate thereof, as above. 3dly. The manifeſt, giving an account of the cargo, and its contents particularly. 4thly. Charter-parties and bills of lading. 5thly. Cuſtom-houſe papers, clearances, &c. 6thly. The ſhip letters, giving an account to the correſpondent of the contents and deſtination of the cargo. Becauſe, from a thorough inveſtigation of theſe, the fairneſs of the tranſaction, particularly in caſes of prize, can generally be aſcertained; and alſo in cauſes in the inſtance court, involving queſtions of poſſeſſory right, the examination of them may be very neceſſary.

By the Iriſh act, 27 Geo. III. ch. 23, it was enacted, that the Engliſh navigation act ſhould be in full force in that kingdom; but it had been before directed to be obſerved by the new rules: and a great lawyer, Sir William Jones, ſoon after the navigation act was paſſed, being conſulted, gave his opinion, that a ſhip built in Ireland, and a captain or mariner having a domicile in Ireland, were within the intention of the act.

The ſtrictneſs of the navigation acts is frequently departed from in time of war, from neceſſity; as for example, by the act 13 Geo. II. ch. 3, and 36 Geo. III. ch. 76. There are many moſt material new regulations by 34 of Geo. III. ch. 68, which alſo deſcribes accurately who are Britiſh ſailors and maſters.

OWNERS.

Where a ſhip appertains to a ſingle proprietor, little can occur that is neceſſary to be mentioned in an admiralty treatiſe. His duties in not diſobeying the laws of the land, made againſt ſmuggling in time of peace, and againſt contraband in time of war, are as extenſive as thoſe laws, and do not come within the bounds of my deſign. The proviſions of the act of navigation which he is bound to obey have already been *generally* treated of, and to them I muſt add a minor regulation, viz. that he is obliged by thoſe acts, in conformity with the old maritime laws, to cauſe the name by which the ſhip is regiſtered to be painted on a conſpicuous part of the ſtern, and this name not to be changed.

But the chief controverſies relative to owners, which can come before the court of admiralty, are between part-owners, where there is a ſociety in proprietary ſhip.

Here frequently a perverſe owner may endeavour to embarraſs his partners by refuſing his conſent to a beneficial voyage, in which caſe the other part-owners are obliged to go into the admiralty to obtain a decree in favour of the voyage, they entering into a ſtipulation for the ſafe return of the ſhip. It was an inſtance of this kind (5),

(5) Degrave v. Hedges, 2 Lord Raymond.—See alſo 1 Lord Raym. 223 and 235.

where the ſhip was loſt, which occaſioned one of thoſe ſharp diſputes on the validity of ſtipulations mentioned in the laſt chapter.

If in ſuch a caſe the ſhip returns ſafely, and the diſſentient partner would not contribute to the fitting her out, he gets no ſhare of the profits (6).

It is ſaid by Molloy (7), that if the major part of the owners inſiſt on the voyage, the minor muſt ſubmit; but then the latter may go into the admiralty, and inſiſt upon the former entering into ſtipulation for the ſhip's ſafe return; and if they neglect to do ſo, and the ſhip be loſt, they muſt abide by the loſs. By the major part is meant in *value*, not in number.

The account of the voyage, ſettled by the major part of the part-owners, binds the reſt. Part-owners are not anſwerable but in proportion to their ſhares.—1 Vent[3].

How far ſome owners may compel the reſt to ſell is the next conſideration; and, according to Molloy, if one owner is ſo obſtinate that his conſent to a voyage cannot be had, the law will enforce him to ſell his proportion; or, if he will ſet no price, the voyage goes on: he gets no ſhare of the profit, but muſt be reimburſed if the ſhip be loſt. And if the major part refuſe to ſet out the veſſel to ſea, they may not be compelled; but the veſſel is to be valued and ſold.

(6) Sir L. Jenkins, p. 792. 2d. volume.

(7) P. 308 and 310.

But in Ouſton v. Hebden, 1 Wilſon, 101, part-owners being much the minor part in value, though more in number, prayed in the admiralty that the chief part-owner (who inſiſted on going a voyage againſt their will) ſhould be obliged to join them in ſelling the ſhip, or for ſuch other remedy as the court might think proper, their object being either to make him buy their ſhares, or elſe that the ſhip ſhould be ſold, and the money diſtributed amongſt them in proportion. Chief Juſtice Lee, on a prohibition prayed, held that the admiralty had no power to compel a *ſale*, but might compel *ſecurity*, for that is a proceeding in rem, not in perſonam (8); but could not force a party to ſell, or to buy the ſhares of others.

As to the time when a man becomes owner, it has been ruled, that if a ſhip be ſold while at ſea, the delivery of the grand bill of ſale veſts the property, and amounts to a delivery of the ſhip itſelf: it is the only delivery which the ſubject matter is capable of. The bill of ſale is the only muniment of the property: by the vendee's taking that, he prevents the vender from defrauding others (9). A perſon, by being merely in poſſeſſion of a ſhip, doth not acquire any credit, for he will be always required to ſhew how he is owner.

(8) Here it is plainly implied, that the admiralty never can act in perſonam, unleſs by conſent of the party.

(9) Atkinſon v. Maling, 2 Term Reports, 64.

The ſame rules apply to the mortgage of a ſhip at ſea, which is frequently made, univerſally recognized, and encouraged, for the benefit of trade, and it is not conſidered like the mortgage of other ſpecies of property—from the nature of it no actual delivery of the thing itſelf can be made at the time of the mortgage, and this is warranted by the common courſe of trade (10).

A bill of ſale of a ſhip is abſolutely void, unleſs the certificate of the regiſtry be truly and accurately inſerted therein (11).

Ships are rateable to the poor in the pariſh to which they belong, but the pay of officers in the navy, or in the merchant ſervice, is not (12).

If money be lent on the ſecurity of a ſhip, and poſſeſſion taken before execution at the ſuit of another perſon, the veſſel cannot be ſeized under that execution. It is remarkable, that in the caſe (13) in which this was determined, the money was lent in England on an Engliſh ſhip, and the poſſeſſion taken by admiralty proceſs.

MASTERS.

The maſter of a ſhip doth not, by being conſtituted maſter, acquire any property therein,

(10) Atkinſon *v.* Maling, 2 Term Reports, 64.

(11) 26 Geo. III. ch. 60. ſec. 17.

(12) 4 Term Reports, p. 771. and Rolleſton *v.* Hibbert, 3 Term Reports, p. 406.

(13) Ladbroke *v.* Cricket, 2 Term Reports, 649.

either general or ſpecial; he is only conſidered as an officer, who muſt render and give an account for the whole charge, when once committed to his care and cuſtody; and upon failure to render ſatisfaction; and, therefore, if misfortunes happen, if they be either through negligence, wilfulneſs, or ignorance of himſelf or his mariners, he muſt be reſponſible (14).

The maſter is the agent of the owner of the veſſel, and can bind him by his contract, or affect him by his miſconduct, and, by the civil law, the ſhip alſo; but he is not the agent of the owners of the cargo, unleſs ſo expreſsly conſtituted by them (15).

The maſter of a ſhip having no property in her, either general or ſpecial, cannot, by the common law, empawn the ſhip; but by the laws of Oleron, and the admiralty law, if a ſhip be at ſea and takes leak, or otherwiſe want victuals or other neceſſaries, whereby either herſelf be in danger, or the voyage be defeated, that in ſuch caſe of neceſſity the maſter may empawn for money, or other things, to relieve ſuch extremities, by employing the ſame to that end (16).

(14) Molloy, vol. I. 322.

(15) 1 Robinſon, p. 84 and 85. Caſes of inſurance form no exception to this rule, for there is an expreſs contract which governs the whole caſe; and in revenue caſes, poſitive laws, and the neceſſary ſtrictneſs of fiſcal regulations, interfere.

(16) Molloy, vol. I. p. 332.

But the maſter, for any debt of his own, cannot empawn or hypothecate the ſhip, &c. for the ſame is no way liable, but in caſe of neceſſity, for the relief and completing of the voyage (17); and it follows, *a fortiori*, cannot ſell or diſpoſe of the ſame, without an authority or licence from the owners (18).

Though the maſter has no power, ſtrictly ſpeaking, to ſell any part of the ſhip or cargo, yet it is ſaid that from great neceſſity, if he cannot hypothecate the lading, he may ſell the ſame, that is, ſo much as is neceſſary.

Though the maſter wants money for the uſe of the ſhip before the voyage commences, yet he cannot hypothecate her, nor can he raiſe money upon her, or her furniture, by the way of a common pawn or mortgage, unleſs he be part-owner, and then no further than his own part or ſhare in her, by which he may transfer and grant, as a man may do, a fifth or an eighth part in lands or houſes.

Though the maſter of a veſſel be alſo leſſee of it, with covenant on their part that he ſhould have the ſole management of it, and on his that he ſhould *repair* at his *own coſt*, the owners are ſtill liable for neceſſaries furniſhed for the ſhip by order of the maſter, though without their knowledge, and without their being known to the perſon who ſupplied them (19).

(17) Lord Raym. 984.—(18) Ibid. Johnſon *v.* Shippen.
(19) Molloy, p. 335.

Where goods are ordered for a ſhip by the owners before the appointment of the captain, though ſome are not delivered till afterwards; yet, as no perſonal credit is given to the captain, he is not anſwerable for any of them(20): but where the captain contracts for the goods, though they are furniſhed for the uſe of the ſhip, he is anſwerable *in reſpect* of his contract. So that, in ſuch a caſe, the tradesman hath a claim both on the captain and owners, as well as a ſpecific lien on the ſhip itſelf (21).

The powers, duties, and privileges of the maſter, come next under our conſideration; but theſe and ſimilar queſtions being complicated and controverted, it is better to conſider more minutely and analytically

How far the contracts or torts of the maſter affect the owners.

The queſtion how far the contracts entered into, or the torts committed by the maſter, bind or affect the owners, ſeems to have been one very imperfectly reſolved by the profeſſors of the common law, whoſe opinions differ remarkably on the ſubject. We find it ſometimes ſaid, that all the maſter's contracts and faults extend in their effects

(20) Rich v. Coe, Cowper, 635.

(21) 1 Term Reports, p. 108. Farmer v. Davies. It is very obſervable, that in this caſe it is ſaid, as in Rich v. Coe, Lord Mansfield ſays the tradeſman has a ſpecific lien on the ſhip—why not then ſue in the admiralty?

and conſequences to their employers; while, at other times, this rule is confined to ſuch contracts only as are for his benefit. On other occaſions, we hear that the maſter cannot bind the owner beyond the value of the ſhip and cargo, a poſition which we find to be controverted, perhaps, in the following page.

Not to multiply inſtances: in a late caſe (22)—in which the maſter of a ſhip taken by the enemy had not only ranſomed her for a ſum above her value, but had alſo entered into a collateral pecuniary agreement with one of the crew, by which agreement, in the opinion of the majority of the judges, the owner was bound—the greateſt diverſity of opinion occurs; two learned judges inſiſting that the owner may be bound beyond the value of the ſhip and cargo, while a third poſitively denies the poſition: one eminent judge adopting a general rule, that all contracts of the maſter bind the owners perſonally (23), and to their full extent, with only two exceptions, which are confined to the value of the ſhip, viz. the inſtances of hypothecation and ranſom; and another, ſtill more eminent, maintaining, that as he is entruſted with the ſhip and cargo only, he can-

(22) Yeats *v.* Hall, 1 Term Reports, p. 79.

(23) Roccus, though an eminent civilian and writer on maritime law, lays down the rule in that looſe and general way—"Dominus navis," ſays he, "tenetur ex contractu "et delicto magiſtri navis ab eo præpoſiti." Notabil. 11um. De Navibus.

not make contracts beyond their amount, nor any contract binding the owners, which is not to them beneficial.

With the greateſt deference, no one of theſe contrary propoſitions ſeem to me to be ſtrictly true; and the variety of opinion appears to have proceeded from neglecting to recur to thoſe principles of the civil and maritime law, in which, in my apprehenſion, theſe queſtions will find a ready ſolution.

According to the civil law, no one could be bound by the acts of another, *nemo alterius contractu obligari debet.* But, amongſt other exceptions to this general rule, evident neceſſity introduced one (24) with reſpect to owners of ſhips, of whom it was ſaid that *facta nautarum præſtare deberent* (25). But they were not anſwerable for all contracts of the maſter, nor even for all thoſe which were for their benefit (26), but for ſuch

(24) Cum interdum ignari cujus ſint conditionis vel qualitatis, cum magiſtris propter navigandi neceſſitatem, contrahamus æquum fuit, eum qui magiſtrum navi impoſuit, teneri. Ut tenetur qui inſtitorem tabernæ vel negotio præpoſuit. Cum ſit major neceſſitas &. Nam in navis magiſtro interdum locus, tempus, non patitur plenius deliberandi conſilium. —— Pandects, lib. 14. De Exercitoria Actione.

(25) Fourth book of the Digeſts, tit. q. The reſtrictions on this rule, as reſpecting common ſailors, will appear hereafter.

(26) Mr. Juſtice Buller, in the caſe of Yeats *v.* Hall, ſtates inſtances of poſſible contracts of the maſter, which he

only as were made in the progreſs or within the limits of the buſineſs committed to the maſter's charge, *in illa re, cui præpoſitus ſit magiſter*, or, to uſe the words of Judge Buller in the caſe recently mentioned, within the compaſs of their employment. But if the contract was made within that compaſs, and in the execution of the buſineſs committed to their charge, though it exceeded the value of the ſhip and cargo, it bound the owner perſonally to the full amount covenanted, or as the Roman law termed it, *in ſolidum*; for whenever a perſon was liable by that code for the act of another, he was liable for it in its fulleſt extent; ſince, as Bynkerſhoek obſerves, *qui aliorum facta præſtant, ex aſſe præſtare debent:* if the maſter, therefore, makes a contract in a foreign country, that his owners ſhould purchaſe an habitation or eſtabliſh a factory in that country, it could not bind them, for this agreement is quite foreign to his authority and employment; but if he borrowed money for the repairs of the ſhip, and embezzled or converted it to his own uſe, the owner, though he thus derived no benefit from the loan (27), or even though it exceeded the

thinks would not bind the owners, though apparently for their benefit: as if a captain of a ſhip choſe to contract with two or three privateers to guard him from an enemy during the voyage.

(27) Si magiſter ad reficiendam navem mutuatus, nummos ad ſuos uſus converterit, recte ait ofilius, teneri exercitorem, ſibi imputaturum, cur talem præpoſuerit.——

value of the ſhip and cargo, was reſponſible for the acts of the fraudulent maſter appointed by himſelf (28): and theſe rules of the civil law, which are to be found in the Pandects *De Exercitoria Actione*, or derived and collected by analogy from what is ſaid in that collection and the code De Cauponibus, Stabulariis, &c. have been adopted by the continental maritime nations of Europe (whoſe great guide is the civil law), and ought, as I conceive, to govern with us (29).

The ſame principle extends itſelf to torts. If the captain of a privateer *emiſſus ad prædandum, perperam prædetur*, if commiſſioned to cruiſe againſt the enemy, he plunders a friend, the owner is reſponſible. His agent was acting in his province or department, and committed outrage; but if the captain by error, or negligence, or deſign, with his ſhip ran down, ſunk, or deſtroyed another veſſel, the owner was not anſwerable (though the captain was), for he did not authoriſe the captain or maſter to run down ſhips; it was not a matter *ad*

Bynkerſhoek, Quæs. Pub. Jur. cap. 19. He obſerves, that ſuch is the Dutch law. I admit that this doctrine is not undiſputed.

(28) See ſome reſtrictions on this rule in Roccus.

(29) Si ex facto inſtitoris vel magiſtri tabernæ vel navis dominus teneatur, conſtat teneri, quanti res ſit, nec liberari, ſi tabernam vel navem dedere *(to abandon)* parati ſint. Eam juris prudentiam nuſquam legiſſe memini, nec etiam rationem habet.—Bynkerſhoek, Q. P. J. cap. 19.

officium ejus pertinens (30): and if the owner's ſhip can in ſuch caſe be ſeized, it is only to oblige the captain to give bail, and then the owner may be ſaid to be reſponſible in a collateral way, as far as the value of the ſhip and cargo, but no further.

If there are ſeveral owners, each of them is reſponſible for the contract of the maſter, made in the courſe of any buſineſs, over the conduct of which he was ſet; but if he is guilty of a tort in matters totally foreign to his authority, then, agreeably to what has been ſaid above, none of them were anſwerable: and if involuntary damage was done by him in any caſe, for which they were made reſponſible by poſitive law (as in the caſe of the accidental colliſion of ſhips without fault in the crew of either, which ſubjected them to half the loſs as far as the value of the ſhip and cargo), each was reſponſible only in proportion to his own ſhare, and all this was agreeable to the Roman law (31).

(30) Bynkerſhoek, who ſeems to have much natural humour, ſays, "Certe magiſtri officium non eſt aliorum "naves obruere, nec quiſquam ſanus huic negotio præ-"poſitum dixerit."

(31) Neque in ſolidum, quando quis ſine culpa damnum dedit, actionem eſſe dandam contra unum ex pluribus dominis navis.—Neque id etiam adverſatur Juri Romano.—Bynkerſhoek, Qu. Pub. Jur. cap. 20.

How far the contracts or torts of the maſter ſhall affect the ſhip.

It is ſaid by the court, in a caſe (32) reported by a celebrated judge, that by the maritime law every contract with the maſter of a ſhip implies an hypothecation, though by the law of England it is otherwiſe. I know not where this maritime law is to be found. There is no ſuch rule in the civil law. That law doth expreſsly and *nominatim* enumerate all the tacit pledges which it acknowledges (33), yet mentions no ſuch one as this. It is ſaid, indeed, that as the repairs of houſes at Rome included a tacit pledge, ſo by analogy we muſt ſuppoſe did thoſe of ſhips. But Vinnius has refuted this analogy, and agrees with me in opinion, that though the perſon furniſhing money for ſuch repairs was preferred to any other creditor (34), he had not, without expreſs agreement, any qualified or hypothecatory property in the ſhip, and his remedy was not the *actio hypothecaria*, but the *actio in factum*, not a mortgage ſuit, but an action on the caſe. And Roccus, ſpeaking of the modern maritime law, ſo far from extending this right of tacit pledge by implication to all

(32) In Juſtin *v.* Ballam, Lord Raymond, p. 805.

(33) In various places, in the 20th, 24th, and 42d of the Pandects, and 8th book of the Code.

(34) See book 20th of the Digeſts, tit. 4th. *Qui potiores in pignore.*

contracts of the maſter, appears to confine it to mariners wages—to money borrowed to purchaſe a cargo—to furniſh proviſions for the ſailors—or to pay the rent of a ſtore-houſe for goods landed—mentioning the lender for ſhips repairs, or payment of cuſtom duties, as merely having a preference to other creditors (35).

Where a tacit pledge exiſted, it did not by the Roman law affect a *bonâ fide* purchaſer. Things tacitly pledged might be freely alienated before they were arreſted (36); as with us a bond, without a judgment, doth not follow the land in the hands of a *bonâ fide* purchaſer, though it is ſaid to be an incumbrance on the land (37).

The torts of the maſter cannot be ſuppoſed to *hypothecate* the ſhip; nor, in my humble judgment, in ſtrictneſs of ſpeech, to produce any *lien* on it. How then is the ſhip forfeited, and loſt to the owner, by his captain's miſconduct? In my apprehenſion, only in this collateral way, that it is (agreeably to the practice of the Roman law as to its own citizens, extended by the modern maritime law to foreigners) (38) arreſted until he gives bail or *fide juſſores*, and ſold for defaults and contempts if he will not appear.

(35) Roccus, De Navibus Notab. 91, 92, 93.

(36) See Dig. 20. 2. 9. and Ayliffe's Civil Law, 529.

(37) See 2 Blackſtone, ch. 20. and Dr. Chriſtian's note, No. 11.

(38) See Huberus on this practice, and on the province of Frieſland, faithful to the old Roman law, refuting it.

We have now done with the effect of the maſter's contracts, or violence, as to his owners, and proceed to conſider how he and they are affected by his negligence. And firſt, as ſoon as merchandizes and other commodities be put on board a ſhip, whether ſhe be riding in a port or haven, or upon the high ſea, the maſter is chargeable therewith; and if the ſame be loſt or purloined, or ſuſtain any damage, hurt, or loſs, whether in the haven or port before or upon the ſeas after ſhe is upon her voyage, whether it be by mariners, or by any other through their permiſſion, the owner of the goods has his election to charge either maſter or owners, or both at his pleaſure—though he can have but one ſatisfaction—in a court of common law, if the fault be committed *infra corpus comitatus*; in the admiralty if *ſuper altum mare*; and if it be on a place where there is *diviſum imperium*, then in one or the other, according to the flux or reflux of the ſea. Even accident or force is no excuſe; the maſter muſt anſwer, though the loſs was occaſioned by fire or thieves, or any other accident, the act of God (39) or of an enemy only excepted. And if a maſter ſhall receive goods at the wharf or key, or ſhall ſend his boat for the ſame, and they happen to be loſt, he ſhall likewiſe anſwer both by the marine law and the common law.

(39) Freighters of ſhips, that is, owners and captains, are not anſwerable for damage by the act of God, as inſurers would be.—Douglas, 264.

This ſeverity of the maritime law requiring ſome modification, by the act of the 26 G. III. c. 86. (40) it was enacted, "That no owners of any ſhip ſhall be ſubject to make good any loſs or damage by reaſon of any robbery or embezzlement, ſecreting, or making away with, of any gold, ſilver, diamonds, jewels, precious ſtones, or other goods or merchandize, which ſhall be ſhipped on board any ſhip, or for any act or forfeiture done or occaſioned without the knowledge of ſuch owners, further than the value of the ſhip, with all her appurtenance, and the full amount of the freight due, or to grow due for the voyage wherein ſuch robbery, &c. ſhall be made, &c. although the maſter or mariners ſhall not be concerned in or privy to ſuch robbery, &c."—Sec. 1.

"That no owner of any veſſel ſhall be ſubject to anſwer for any loſs or damage which may happen to goods ſhipped on board ſuch ſhip, by reaſon of any fire happening on board the ſaid ſhip."—Sec. 2.

"That no maſter or owners of any ſhip ſhall be ſubject to anſwer for any loſs or damage which may happen to any gold, ſilver, diamonds, watches,

(40) It had been before provided, by 7 Geo. II. ch. 15. that owners ſhould not be liable for embezzlement by maſter and mariners of goods ſhipped, nor for any act done by them, without the privity of the owners, beyond the value of the ſhip and freight. See alſo this act interpreted to extend to robbery, in Sutton *v.* Mitchell, 1 Term Reports, p. 18.

jewels, or precious ſtones, put on board ſuch ſhip, by reaſon of any robbery, &c. unleſs the owner or ſhipper thereof ſhall, at the time of ſhipping the ſame, inſert in his bill of lading, or otherwiſe declare in writing to the maſter or owners, the true nature, quality, and value of ſuch gold, &c."—Sec. 3.

"That if ſeveral freighters or proprietors of any ſuch gold, &c. or other goods, ſhall ſuffer any loſs or damage by any of the means aforeſaid, in the ſame voyage (fire only excepted), and the value of the ſhip, with her appurtenances, and the amount of the freight during ſuch voyage ſhall not be ſufficient to make full compenſation to all of them, ſuch freighters or proprietors ſhall receive their ſatisfaction thereout in average, in proportion to their loſſes; and in ſuch caſe it ſhall be lawful for ſuch freighters or proprietors, or for the owners of ſuch ſhip, to exhibit a bill in any court of equity for a diſcovery of the total amount of ſuch loſſes, and alſo of the value of ſuch ſhip, appurtenances and freight, and for an equal diſtribution and payment thereof amongſt ſuch freighters or proprietors, in proportion to their loſſes, according to equity; but if ſuch bill ſhall be exhibited by the part-owners of ſuch ſhip, the plaintiffs ſhall annex an affidavit to ſuch bill, that they do not collude with any of the defendants, and ſhall thereby offer to pay the value of ſuch ſhip, appurtenances, and freight, as ſuch court ſhall direct; and ſuch court ſhall thereupon take ſuch

method for aſcertaining ſuch value as to them ſhall ſeem juſt, and ſhall direct the payment thereof in like manner as is now uſed in ſuch caſes of bills of interpleader."—Sec. 4.

"That nothing in this act ſhould impeach, leſſen, or diſcharge any remedy which any perſon ſhould have againſt the maſter and mariners of ſuch ſhip, for any embezzlement, &c. or on account of any fraud, abuſe, or malverſation of ſuch maſter or mariners; but it ſhould be lawful for every perſon ſo injured to purſue ſuch remedy, as he might have done before that act."—Sec. 5. (41).

The maſter's duties.

Theſe are aſcertained either by the common marine law, or by act of parliament.

By the common marine law he is to be careful not to break any embargo; and if he does, if any damage accrues, he muſt be reſponſible for the ſame.

By the ſame law he muſt not ſail in tempeſtuous weather, nor put forth to ſea without having firſt conſulted with his company; nor muſt he ſtay in port or harbour, without juſt cauſe, when a fair wind invites his departure.

(41) This act, in reality, only enacts the proviſions or principles of the old marine laws. See the 41ſt article of the laws of Wiſbuy, and the 13th of the ſecond fragment of the Rhodian laws.

He muſt not over-charge or lade his ſhip above the birth-mark, or take into his ſhip any perſon of an obſcure and unknown condition, without letters of ſafe conduct.

Nor ought he to lade any of his merchant's goods aboard any of the king's enemies ſhips (admitting his own veſſel leaky or diſabled) without letters of ſafe conduct, otherwiſe the ſame may be made prize, and he muſt anſwer the damage that follows the action.

Nor ſhall he come and ſneak into the creeks, or other places, when laden homewards, but into the king's great ports (unleſs he be driven in by tempeſt), for otherwiſe he forfeits to the king all the merchandize, and therefore muſt anſwer.

Nor ought he to ſhip any merchandizes, but only at the public ports and keys.

He muſt not part with the ſhip's proviſions, except to ſhips in diſtreſs at ſea, and muſt buy every thing at the moſt reaſonable rate.

He muſt not lade any prohibited or unlawful goods, whereby the whole cargo may be in danger of confiſcation, or at leaſt ſubject to ſeizure or ſurreption.

He may not ſet ſail without able and ſufficient mariners, both for quality and number.

He muſt not uſe unlawful colours, nor carry counterfeit coquets or colourable ſhip's papers.

He muſt not refuſe the payment of the juſt and ordinary duties, and port-charges and cuſtoms. It would be endleſs to enumerate all the obligations

on him, induced by the revenue laws, in detail.

He muſt not ſet ſail with inſufficient rigging or tackle, or with other or fewer cables than is uſual and requiſite, reſpect being had to the burthen of the veſſel; nor in bad weather, nor againſt the advice of his mariners: and if any damage happens by the delivery of the goods into the lighter, as that the ropes break, and the like, there he muſt anſwer; but if the lighter comes to the wharf or key, and then, in taking up the goods, the rope breaks, the maſter is excuſed, and the wharfinger is liable.

If fine goods, or the like, are put into a cloſe lighter, and to be conveyed from the ſhip to the key, it is uſual there, that the maſter ſend a competent number of his mariners to look to the merchandize: if then any of the goods are loſt and embezzled, the maſter is reſponſible, and not the wharfinger; but if ſuch goods are to be ſent aboard a ſhip, there the wharfinger, at his peril, muſt take care the ſame be preſerved.

After his arrival at port, he ought to ſee that the ſhip be well moored and anchored; and after reladed, not to depart or to ſet ſail till he hath been cleared; for if any damage happens by reaſon of any fault or negligence in him or his mariners, whereby the merchant or the lading receives any damage, he muſt anſwer the ſame.

Even an infant maſter of a ſhip is liable to be ſued in the admiralty (42); and his reſponſibility being ſo great, it is not uncommon to increaſe his intereſt in the welfare of the ſhip by making him a joint partner in the ſame.

Of the duties impoſed upon the maſter by act of parliament, the firſt is to deduct out of every ſeaman's wages ſixpence per month, and pay the ſame to ſuch officers as ſhall be appointed by the commiſſioners for executing the office of lord high admiral, to be applied to the ſupport of Greenwich hoſpital (43). Maſters and ſervants of veſſels belonging to the port of London, and employed within the North Foreland in bringing corn, fiſh, or other proviſions, to London, are exempted from this hoſpital duty.

He is to collect or deduct another ſixpence per month from every ſeaman's wages for the ſupport of ſick, maimed, and diſabled ſeamen, and of the widows and children of ſuch as ſhall be killed, ſlain, or maimed, in the merchants' ſervice.—20 Geo. II. ch. 38.

It is not lawful for any maſter of a ſhip bound beyond the ſeas to carry any mariner, except his apprentices, from the port where he was ſhipped, to proceed on any voyage beyond the ſeas, without firſt coming to an agreement with ſuch ma-

(42) 1 Rolls Ab. 530.

(43) 10 Anne, ch. 17. ſec. 2. The method of enforcing payment is in the 4th ſection. See alſo 2 George II. ch. 7.

riners for their wages; which agreement ſhall be made in writing, declaring what wages each ſeaman is to have for ſo long as they ſhall ſhip themſelves, and alſo to expreſs in the agreement the voyage for which ſuch ſeaman was ſhipped. And if any ſuch maſter ſhall carry out any mariner, except his apprentice, upon any voyage beyond the ſeas, without firſt entering into ſuch agreement, and he and they ſigning the ſame, he ſhall forfeit five pounds for every ſuch mariner to the uſe of Greenwich hoſpital, to be recovered on information, on the oath of one witneſs before one juſtice of peace, who is required to iſſue his warrant to bring before him ſuch maſter; and in caſe he refuſes to pay the forfeiture, to grant his warrant to levy it by diſtreſs and ſale of goods, and if no diſtreſs can be found, to commit him to the common gaol till he pay the ſame (44).

Similar proviſions are extended to the coaſting trade; and it is here ſtated ſomewhat more particularly, that the agreement ſhall declare what wages each mariner is to have, and when the ſame ſhall be payable, and for what time, or for what voyage the mariner enters; ſuch agreement to be in force at the time of proceeding to ſea. The written agreement is alſo ordered by a ſpecial act (45) in the African trade, and any deviation from the

(44) 2 Geo. II. ch. 36. In Ireland it is 5 Geo. II. ch. 13. Both of them ſince made perpetual.

(45) 31 Geo. III. ch. 39.

ſet form forbidden (46); and ſo it is in the Weſt India trade by an Iriſh act (47).

His obligation to pay a duty on paſſing the Eddyſtone light-houſe is very well known (48); and the very violent and ſevere penalties impoſed on him in the laſt century, if he yielded his ſhip to a Turkiſh pirate, ſeem to have been dictated by temporary circumſtances now not very material.

He is to take particular care not to receive as a mariner any deſerter from his majeſty's ſhips (49).

If he diſobeys the ſignals and orders of convoy, he is puniſhable with fine and impriſonment by the prize acts.

By 38 Geo. III. ch. 76. to ſail without convoy, or to part from convoy, is puniſhable: as by the old laws of the Hanſe Towns (50) if ſeveral ſhips were in company on the ſame voyage, they were obliged to ſtay for one another, or be liable to all the damages that might happen to the others by an enemy or by pirates; and in the ſame manner the penalties for encouraging deſertion by our laws, may be compared with the 48th article of the laws of the Hanſe Towns, by which the maſter who debauched a ſeaman, and hired him after he had hired himſelf to another maſter, was to pay twenty-five livres, and the mariner to pay to the

(46) 39 Geo. III. ch. 80.—(47) 38 Geo. III. ch. 48.
(48) 4 and 5 Anne, ch. 20. and 8 Anne, ch. 17.
(49) Anne, ch. 37.—(50) Article 17.

firſt maſter, for damages, half the wages the ſecond had promiſed him.

Among ſmaller duties—When he arrives with his ſhip at Graveſend, he is not to be above three days coming from thence to the place of diſcharge; he is not to receive any gunpowder on board before the ſhip is over againſt Blackwall, on pain of five pounds for every fifty pounds weight carried; and he muſt in the ſame manner, on coming into the Thames, before he arrives at the ſame place, put it on ſhore, or within twenty-four hours after he anchors there, and not keep any gun ſhotted, or fire any gun before ſun-riſing or after ſun-ſetting, between London bridge and Blackwall, under heavy fines: humane proviſions, intended (51) to pervent accidents in a frequent population.

If he or any mariner wilfully deſtroy, or burn, or caſt away the ſhip, it is felony (52).

The maſter's duties in time of war, or the inſtances of miſconduct he may be guilty of, are as numerous as the rules of the law of nations againſt which he may offend. It were endleſs to recount them. One inſtance may illuſtrate them, than which none is more frequent, his attempting to break a blockade.

Thus much of the maſter's duties. Now of his rights and privileges.—That he cannot ſue for wages in the admiralty has been repeatedly men-

(51) By a ſtatute of Charles II.
(52) 13 and 14 Charles II. ch. 11.

tioned, together with the reaſon of this reſtriction, which extends to his executors. He has a lien on the ſhip for the freight, and may retain the cargo till the freight is paid (53); but it is ſaid, if he once let it out of his hands, he cannot retake it by admiralty proceſs (54). The ſhip, by the law of the admiralty, ſhall anſwer for the redemption or ranſom of the maſter (55). He may reimburſe himſelf out of the mariners wages for a loſs happening by their negligence (56).

By the French ordinances of 1681, no maſter, patron, pilot, or mariner, is to be arreſted for a civil debt, being on board ready to put to ſea, except it be for debts contracted for the voyage, as by ſome acts of parliament ſeamen in the royal navy cannot be arreſted for debts under twenty pounds.

He is not anſwerable for the contracts of his mariners, unleſs he recommends them to credit.

The bounties given to him and to mariners in the Britiſh fiſheries, and on other occaſions, are too numerous to be here inſerted.

In the Roman State, ſeamen enjoyed exemption from many public offices and duties; and to build a ſhip of a certain ſize, was remunerated with the Jus Quiritium.

In general, however, with us, he muſt be content to have his good actions remunerated, like every

(53) 2 Eq. Ca. Ab. 98. pl. 1.

(54) See 2 Lord Raym. 934. and 3 Term Rep. p. 323.

(55) 1 L. Raym. 650.—(56) Ibid. p. 22.

other individual member of the ſtate, by the protection of its laws, and the enjoyment of its ſecurity.

MARINERS.

In what has been ſaid about ſhips, owners, and maſters, in this chapter, I have deviated from the ſtrict line to matters not always or directly cognizable by the admiralty, but the knowledge of which may be incidentally and collaterally uſeful and requiſite to the practitioner in that court. But the preſent head doth eſpecially come within the province of the inſtance court; and no ſuit more frequently engages his attention than that of a mariner's wages. Every perſon employed in navigating the ſhip, except the maſter (57), may ſue for his wages here, and any number of them may join in the ſame ſuit: and as the refuſal of payment generally proceeds upon alleged miſconduct or breach of contract on their part, it becomes neceſſary to conſider the duties and obligations, by neglect of which they become liable to the loſs of their wages: and theſe duties ſhall be viewed, in order of time, as they ariſe before the commencement, during the period, or at the concluſion of the voyage.

(57) The carpenter and the boatſwain may ſue here: the mate becoming maſter pending the voyage, may ſue for his previous wages, or as mate through the whole time.

The maſter's duty, as preſcribed by acts of parliament, of entering into written articles with them, has been above ſtated; they on their part are bound to ſign the ſaid articles of agreement, in caſe of a voyage to parts beyond the ſeas, within three days after they have entered themſelves, and in caſe of voyages coaſtways at the time of entering; and this agreement, when it is ſigned, is binding and concluſive (58) upon all parties during the time contracted for.

If any ſeaman ſhall deſert, or refuſe to proceed on the voyage, after he ſhall have ſigned ſuch contract, he ſhall forfeit to the owners of ſuch ſhip the wages due to him at the time of his deſerting, or refuſing to proceed on the voyage (59).

If any ſuch ſeaman ſhall deſert or abſent himſelf from ſuch ſhip, after he hath ſigned ſuch contract, upon application made to any juſtice of peace by the maſter, or other perſon having charge

(58) As to its being perfectly concluſive, ſee the caſe of the Iſabella in the inſtance court, 2 Robinſon, p. 241.

(59) The ſailor was allowed by the Conſolato del Mare, though he had ſigned the contract, or verbally agreedby taking the maſter's hand which was equivalent, to excuſe himſelf before the voyage began, for the three following reaſons, which will appear to us ſomewhat ludicrous: *Per pigliár móglie, per andár in pellegrinággio*, or *per aver fatto voto, innánzi, che ti accordaſſe.* If he wanted to take a wife, to go on a pilgrimage, or to perform a vow made previouſly to his contract.

of the ſhip, it ſhall be lawful for ſuch juſtice to iſſue his warrant to apprehend ſuch ſeaman; and if he ſhall refuſe to proceed on the voyage, and ſhall not give a ſufficient reaſon for ſuch refuſal, to the ſatisfaction of the juſtice, to commit him to the houſe of correction, to be kept to hard labour, not exceeding thirty days, nor leſs than fourteen.

The agreement for wages, though directed by the acts of parliament above mentioned to be in writing, is not to be under ſeal; and if it be under ſeal, or in any manner ſpecial, the juriſdiction of the admiralty is ouſted.

When the ſeamen have ſigned the articles, they are to appear at the place and on the day appointed, to take on board the proviſions, to rig out the ſhip, and ſet ſail (60).

The contract for wages may be either by the voyage, by the month, or other ſtated period; by the run from port to port; or by the freight, *i. e.* to have a certain proportion of the freight earned: and in all caſes, where it ſhall be neceſſary that the agreement ſhould be produced in court or elſewhere, no obligation ſhall lie on any

(60) Suppoſe the owners, after the articles ſigned, chuſe to alter the voyage or deſtination before the ſhip ſails; the *Conſolato* provides for this caſe by analogy; for what is ſaid in cap. 147, "Si padróne piglia altro viággio," though ſpoken of a ſubſequent time, equally applies in principle to the commencement of the voyage, and releaſes the mariners. *Pigliare*, in this work conſtantly means *prèndere*.

mariner to produce the ſame, but ſuch obligation ſhall lie on the maſter or owners; and no mariner ſhall fail in any ſuit for want of ſuch agreement being produced; and no mariner, by entering into ſuch contract, ſhall be deprived of any means for the recovery of wages againſt any ſhip, or the maſters or owners, which he may now make uſe of.

We have ſeen that the maſter's apprentices are excepted in the act requiring the execution of a written agreement. Voluminous regulations are made concerning theſe apprentices in other acts of parliament, too long to be here recited (61).

By the laws of Wiſbuy and the Hanſe Towns, a maſter may turn off a mariner, without any lawful cauſe given, before he ſets ſail; paying him by the former laws half, by the latter one-third, of what he had promiſed him for the voyage. But this, I conceive, cannot apply to the caſe of articles ſigned, after the time agreed upon has commenced, as the ſailor might ſo, without any fault, loſe other opportunities of profitable hiring.

By the laws of the Hanſe Towns, no maſter was allowed to hire a mariner before he had ſeen his paſs or certificate of his faithful behaviour in the ſervice of his laſt maſter (62), on pain of forfeiting one hundred ſols, unleſs he was neceſſitated

(61) Particularly 2 and 3 of Anne, ch. 6.

(62) "It is not uſual to be minute in the enquiry made "into ſailors characters," ſaith the court, ſpeaking of Britain, 2 Robinſon, p. 262.

in a ſtrange country; and maſters were obliged to give mariners certificates of their faithful ſervice, and if they refuſed or delayed, were to forfeit one hundred ſols (63). And by an act of parliament, with us no ſeaman ſhall leave the ſhip without a diſcharge, on pain of one month's pay.—2 Geo. II.

Caſes of peculiar hardſhip have occurred where ſeamen, inſtead of ſigning the uſual articles, have formed ſpecial agreements for themſelves, which at the time they thought advantageous. Such was that of Cutter *v.* Powel (64), where a ſailor hired for a voyage took a promiſſory note from his employer for a certain ſum much larger than the ordinary wages payable, provided he proceeded, continued, and did his duty on board for the voyage, and before the arrival of the ſhip he died: it was ruled, that the meaning of the contract was to receive the larger ſum if the whole duty were performed, and otherwiſe nothing; and that it was a kind of inſurance; that his adminiſtratrix could not recover on the contract; and there being an expreſs contract, could not have recourſe to an implied one, or a quantum meruit. The ſpecial nature of the agreement, I ſuppoſe, excluded an admiralty ſuit (65).

(63) Articles 18 and 19.—(64) 6 Term Rep. p. 320.

(65) Quere, whether juſtly, if ſuch was an uſual agreement in Weſt India voyage? —It is ſaid in that caſe, *that the doctrine of courts will ſubmit to the ſettled uſage of the trading world.*

The voyage being commenced, and the ſhip having ſailed, the mariners are to pay due obedience to the maſter, who hath the ſupreme rule on ſhip-board, and whoſe power and authority are by the law much countenanced; and this is but reaſonable, as it is of the utmoſt conſequence to preſerve peace and order and good diſcipline when upon that dangerous element; and alſo as he is in many caſes anſwerable for the actions of his mariners, whom he is ſuppoſed to appoint and to entrust.

A maſter of a ſhip may give moderate and due correction to his mariners, and if they bring an action againſt him, he may juſtify the ſame at common law (66); and by the laws of Oleron if a mariner ſhall aſſault the maſter, he is to pay five ſols, or loſe his hand (67); and by the law of Wiſbuy, half his hand in a cruel manner.

A great judge (68), ſome years ſince, is ſaid to have made ſome determination on this ſubject unfavourable to the power of correction of the maſter, and that this determination, ill underſtood, occaſioned much miſchief in the ſea ſervice, and was even the cauſe of that diſorder

(66) Molloy, p. 358.

(67) I know not any expreſs penalty with us. He may of courſe be diſcharged and loſe his wages, and be proſecuted for an aſſault; and that in the admiralty, if the ſtriking was on the high ſea. See, however, the 25th article of *Roughton*, which very much agrees with the *Conſolato*.

(68) Lord Loughborough.

among the ſeamen, which occaſioned the loſs of the Halſewell Eaſt Indiaman in 1786. Having never ſeen any note of this determination, I am not enabled to ſay preciſely to what extent it went.

The laws of Oleron reſtrain the correction of the maſter to one blow (69); and the Conſolato del Mare (70), adopts this rule of moderation in theſe words: "The mariner is obliged to obey "his maſter, though he ſhould call him ill names, "and is enraged againſt him. He ought ſo to "keep out of his ſight, or hide himſelf in the "prow of the ſhip; if the maſter follows him, "he ought to fly to ſome other place from him; "and if he ſtill follows him, then the mariner may "ſtand upon his defence, demanding witneſſes "how he was purſued by the maſter; for the maſ-"ter ought not to paſs into the prow after him."

If a mariner ſhall commit a fault, and the maſter ſhall lift up the towel (71) three times before any mariner, and he ſhall not ſubmit, the maſter, at the next place of land, may diſcharge him; and if he refuſes to go aſhore, he ſhall loſe

(69) Article the 12th. (70) Chap. 16.

(71) I have taken theſe words from Molloy, Book II. ch. 3. ſec. 2. but I ſuſpect that he has here made a very ridiculous miſtake. What is the towel, unleſs he means the appellation ſometimes given by the vulgar to an oaken ſtick. He cites the laws of Oleron, but their words are *oſter la touaille, to deny him his meſs.*

half his wages, and all his goods within the ſhip. If the mariner ſhall ſubmit, and the maſter will not receive the ſame, he ſhall have his whole wages; or if the mariner ſhall depart the ſhip on the maſter's command, and the maſter happens not to take another, and any damage enſues, the maſter muſt anſwer.

Theſe rules do not, in my conception, ſtrictly affect the Britiſh ſervice. The maſter is to preſerve diſcipline generally. If guilty of cruelty, or unreaſonable ſeverity, he will be reſtrained and puniſhed.

The offences particularly ſpecified by the marine law, which ſubject the mariner to puniſhment, or loſs of his wages (72), in the whole or in part, are drunkenneſs, theft, quarrelling, and deſertion. For greater crimes, ſuch as murder, he not only forfeits his wages, but the maſter is bound to ſeize him, and keep him in ſafe cuſtody till he arrives at his port, and then deliver him to juſtice to be puniſhed. And even without crime the mariner may loſe his wages, on proof of his utter incapacity from want of ſkill, &c. to diſcharge the duty which he undertook, and for which he was to receive wages.

We begin with the moſt frequent offence, deſertion. Deſertion during the voyage is puniſhed

(72) If ſailors do not perform their duty, they loſe their wages, 6 Term Reports, p. 323; and ſee the Statute 13 Car. II. Stat. I. Cap. 9.

both by the common marine law, and by acts of parliament. What ſhall be conſtrued deſertion is ſpecially aſcertained for the moſt part in the ſeamens articles, the form of which, in ſome caſes, for inſtance in the Weſt India trade, is fixed by act of parliament, and generally an abſence of forty-eight hours without leave, and ſometimes of twenty-four, is conſtrued to be deſertion, *il ſteſſo giorno debba eſſere ritornáto*, ſays the Conſolato del Mare, cap. 151.

The Conſolato del Mare excuſes the mariner for leaving the ſhip, if on theſe three accounts; *eſſere patrono di nave, piloto, per conventione, & ſi muore il patrone*, to become captain or pilot of another veſſel, or if allowed by ſpecial agreement, or when his captain dies. The laſt is a reaſon moſt unintelligible, for though his pact be ſuppoſed to be only with the captain, it is to ſtay by the veſſel; he was alſo diſcharged from his obligation if the maſter wanted to force him into any dangerous place, as where the plague was; or if the ſhip was ſold to another owner. See cap. 144. *marinaro non e tenuto*, &c. and cap. 148. *Quando li nave ſi vendera*, &c.

By the 20th article of the laws of Oleron, two ſailors at a time in a foreign port may go aſhore, if the ſhip be ſafely moored, but they muſt return in ſuch ſeaſon that the maſter may not loſe the tide.

By the 4th article of the laws of Wiſbuy, no mariner is to ſtay a night on ſhore without the

maſter's leave, nor unmoor the ſhip's boat in the night, on pain of forfeiting two deniers; and by the 17th, he pays any damage that enſues. *A marinaro che non dorme in nave non e tenuto il padrone dar da mangiare.* Conſol. del Marc, cap. 143.

By the 22d article of the laws of the Hanſe Towns, no ſeaman may go aſhore without the conſent of the maſter, pilot, mate, or clerk of the ſhip, under penalty of 25 ſols for each time; and by the 40th article of the ſame, if any ſeaman goes aſhore without leave, and the ſhip ſuffers for want of hands, he ſhall be kept in priſon on bread and water for one year, and corporally puniſhed if any ſeaman loſes his life for want of his aſſiſtance.

But it is ſaid in the 17th article of the laws of Wiſbuy, that if the ſhip be moored with four cables; and in the 33d of the Hanſe Towns, if ſhe be ſafely anchored; the ſailors may go aſhore one after another, or two at a time, for a ſhort and reaſonable ſpace of time.

By the French ordinances, 1681, ſeamen going aſhore without leave, for the firſt fault forfeit five livres, and for the ſecond, are to be corporally puniſhed. I do not find that the Engliſh laws have impoſed ſpecific fines for abſence, but the court of admiralty can deduct from the wages for this and other offences at its diſcretion, pro rata of the damage (73).

(73) Sir L. Jenkins, vol. 1. p. 83. this, he obſerves, a court of law could not do.

Deſertion is thus puniſhed by ſtatute 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. If any ſeaman deſerts, or refuſes to proceed when beyond ſeas, he forfeits all his wages.

A previous Statute, 11 and 12 of William III. c. 7. has words more general. All officers or ſailors who ſhall deſert the ſhips wherein they are hired to ſerve for that voyage, ſhall forfeit their wages, without ſaying *beyond the ſeas.* A command as general as that in the 163d chapter of the Conſolato, viz. *ſenza expreſſa licentia del piloto, o del Scrivano, quando non ci e il patrono, il marinaro non puo diſcendere in terra,* in chap. 171; where he alſo is forbidden to ſleep on ſhore without leave.

By 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. it is enacted, "That if any ſeaman ſhall abſent himſelf from the veſſel to which he belongs, without leave of the maſter or other chief officer having charge of ſuch ſhip, he ſhall, for every days abſence, forfeit two days pay to the uſe of Greenwich Hoſpital (74)."—Sec. 5.

"That if any ſeaman, not entering into the ſervice of his majeſty, ſhall leave the veſſel to which he belongs before he ſhall have a diſcharge in writing from the maſter, or other perſon having the

(74) Forty-eight hours is a complete deſertion. This clauſe, therefore, muſt ſuppoſe the captain to forgive the deſertion, the ſailor paying the penalty.

charge of ſuch veſſel, he ſhall forfeit one month's pay."—Sec. 6.

"That the maſters or owners of ſhips ſhall have power to deduct out of the wages of any ſeaman, all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book ſhall be ſigned by the maſter and two principal officers belonging to ſuch ſhip, ſetting forth that the penalties contained in ſuch book, are the whole penalties ſtopped from any ſeaman during the voyage; which penalties (except the forfeitures of wages to the owners, on the deſertion of any ſeaman, or on refuſing to proceed on the voyage) ſhall go to the uſe of Greenwich Hoſpital, to be paid and accounted for by the maſters of ſhips coming from beyond the ſeas, to the ſame officer at any port who collects the ſix-pence per month, which officer ſhall have power to adminiſter an oath to every maſter touching the truth of ſuch penalties."—Sec. 9.

"That if any maſters or owners of ſhips ſhall deduct out of the wages of any ſeaman, any of the penalties by the act directed to the uſe of Greenwich Hoſpital, and ſhall not pay the money to ſome officer who collects the ſix-pence per month in the port where the deduction ſhall be made, within three months after ſuch deduction, they ſhall forfeit treble the value to the uſe of the Hoſpital; which, together with the uſe of the money deducted, ſhall be recovered by the ſame

means as the penalties for not duly paying the ſix-pence per month."—Sec. 10.

"And that nothing in the act ſhould debar any ſeaman from entering into the ſervice of his majeſty; nor ſhall ſuch ſeaman, for ſuch entry, forfeit the wages due to him during his ſervice in ſuch merchant ſhip; nor ſhall ſuch entry be deemed a deſertion."—Sec. 13.

"But the temptation to deſert in the Weſt Indies, from the high wages there given to mariners, having occaſioned much miſchief and inconvenience, it became neceſſary to make a particular act on the ſubject; and therefore it was enacted, by 37 Geo. III. ch. 73 (75), that no ſeaman, or other, who deſerts at any time during the voyage out or home, from any merchant ſhip trading between the Weſt Indian colonies and Great Britain, barred (beſide other penalties) from ſuing for any wages earned during the voyage, from maſter or owner of a ſhip on board of which he ſhall enter immediately after ſuch deſertion."

"The maſter of a merchant ſhip, bound hither from ſaid plantations, who knowingly hires a deſerter from another veſſel, forfeits one hundred pounds."

"No maſter of a merchant ſhip, ſailing from Great Britain, after the time in the act men-

(75) There is a correſpondent act in Ireland which is there, 38 Geo. III. ch. 48. The forfeitures in Ireland are to the Marine School.

tioned, ſhall hire any one in ſaid colonies, &c. to ſerve on board her, on her voyage back, at a higher rate than double the monthly wages contracted for with perſons in ſame ſtation, at laſt leaving Great Britain, unleſs governor, chief magiſtrate, collector, or comptroller at ſuch place, direct more to be given under his hand; and all contracts and ſecurities to the contrary are void; and maſter or other, engaging or procuring, or paying, &c. forfeit one hundred pounds."—ib. Sec. 3.

"The maſter of every ſuch ſhip is to deliver on oath to collector or comptroller, in ten days after his arrival, out and home, exact liſts of the crew on board at leaving Great Britain, and on arrival at plantations, and of all who died during the voyage, and of the wages due at time of death, penalty fifty pounds."

"No perſon who ſhall, in ſaid colonies, &c. engage himſelf, &c. or enter on board any merchant ſhip that ſhall ſail from Great Britain after the time in the act mentioned, ſhall be entitled to, or ſue for, recover or receive any higher wages, or other gratuity or advantage than as above."—ib. Sec. 5.

"All wages due to any perſon engaged on board any merchant ſhip, for any voyage from Great Britain to ſaid colonies, who dies on board during the voyage, ſhall, in three calendar months after her arrival here, be paid to the receiver of the ſixpence duty, for Greenwich Hoſpital, for the

uſe of the executors, &c. of deceaſed on penalty of fifty pounds, and double the amount."

"The act is not to extend to perſons hired for the voyage home, who at hiring produce certificate as therein of diſcharge from laſt veſſel (which maſter ſhall give in three days after demand, penalty twenty pounds) nor to caſes of neceſſity, hazardous ſervice, or extra duty, proved before chief officer, or a juſtice of peace in ſaid plantations, provided the party did not deſert from his laſt ſhip," &c.—Ib. Sec. 9.

"From the time in the act mentioned, the articles to be entered into between the maſters, ſeamen, and mariners of ſuch merchant ſhips, muſt be agreeable to a form therein preſcribed." —Ib. Sec. 10.

To prevent deſertions, by an act long antecedent to this, maſters and owners of merchantmen are forbidden to pay to any ſeamen beyond the ſeas, any money or effects on account of wages, exceeding one moiety of the wages due at the time of ſuch payment, until the ſhip's return to Great Britain, Ireland, or the Plantations, on pain of forfeiting double the money ſo paid (76).

The next fault to be conſidered is contention and quarelling and fighting, for which, by the laws of Oleron (77), the ſailors may be turned

(76) By 8 Geo. I. ch. 24. made perpetual by 2 Geo. II. ch. 28.

(77) Article 6.

out of the ſhip; and if any of them be wounded, the maſter is not obliged to get them cured, nor in any thing to provide for them. Fighting and giving the lie on board was alſo puniſhed with pecuniary mulcts by the laws of Oleron and of Wiſbuy (78).

If one mariner kills another, or commits any crime too atrocious to be puniſhed adequately by the maſter's power, the maſter is bound to ſeize him, and keep him in ſafe cuſtody till he arrives in port, and then deliver him up to juſtice to be puniſhed (79).

A maſter may at any time turn away a mariner that rebels, or is unfaithful to him (80).

By the Conſolato del Mare, cap. 151; the mariner was even to be ſworn to pay obedience to the maſter, *è obligato anche di giurare, eſſere fidele di patrone*; and by the 159th chapter, he is obliged to obey his captain in every thing, except entering into the ſervice of another ſhip.

As to other exceſſes, by all the marine laws, drunkenneſs is corporally puniſhed. By the French ordinances of 1681, by ducking, and putting in confinement. If it produces neglect of duty, I do not ſee why it ſhould not be puniſhed with loſs of wages.

(78) 12 Article of the former, 24 of the latter.

(79) Wiſbuy, Article 30. (80) Ibid. 29.

By the laws of the Hanſe Towns (81), ſeamen might not feaſt and carouſe in the ſhip without the maſter's leave, on pain of loſing half their wages; and no ſeaman might let his wife lie on board, under penalty of fifty ſols.

Theft, committed by a mariner, by the laws of Oleron, was moſt ſeverely puniſhed. He was to be grievouſly tortured, and to make reſtitution to the owner. If the maſter was an accomplice, he was to make good double to the owners, and the mariner to receive a hundred blows of a cudgel. If the maſter was not conuſant of it, ſtill by by all maritime laws he was anſwerable, for he was ſuppoſed to have been acquainted with the character of his ſailors. By the laws of Wiſbuy (82), the ſeamen were to keep and watch the merchandize, and if they ran away with any thing ſpecially entruſted to them by the maſter, it being proved by two witneſſes, they might be executed, and that as it ſhould ſeem by ſummary proceſs on board the ſhip (83); a power in our free conſtitution very properly refuſed to any but the regular tribunals.

By the laws of the Hanſe Towns, if maſter or mariner kept back any merchandize taken on

(81) Articles 31 and 32.

(82) Articles 47 and 61.

(83) The old maritime laws were extremely arbitrary as to theſe ſummary proceſſes on board; thus, if the ignorance of the pilot occaſioned damage, they might cut off his head.

freight, unleſs in caſe of neceſſity, they were to be apprehended and puniſhed as robbers.

Beawes, in his Lex Mercatoria, obſerves, that barratry (84) of ſeamen is an epidemical diſeaſe. This word means cheating the owners. By the general maritime law, if goods delivered on ſhip-board are embezzled, all the mariners ought to contribute to the ſatisfaction of the party who loſt his goods; and the cauſe is to be tried in the admiralty. Fraud in loſing a ſhip has been determined to be barratry, but negligence is not. The ſpecial acts of parliament relative to marine embezzlements, have already been ſtated under the duty of the maſter.

The Conſolato del Mare puniſhes theft in the ſailor with loſs of his wages, and what goods he may have on board, with power to the maſter alſo to impriſon him, until he can be delivered up into the hands of juſtice (85).

By other acts of parliament, commonly called the acts of cuſtoms, ſeamen concerned in landing goods at improper places and times, are ſubject to ſevere penalties. And here it may be proper to mention, not as a penalty, but as a diſability, that a ſailor cannot inſure his wages, or any thing

(84) He ſpells it Barretry, a word of very different import, which ſignifies ſtirring up ſuits and quarrels.

(85) Cap. 164. "Marinaro, che rubera robba, o eſarcia, "o mercantia che fuſſe nella nave, debbe perdere il ſuo "ſalario, & la robba," &c. &c.

that he is to receive at the end of the voyage in lieu thereof; nor can he recover the value of ſuch thing in an action againſt his agent for negligence, in not procuring ſuch inſurance (86).

By the French ordinances of 1681, mariners are forbidden to take any bread, or draw any drink, without permiſſion of the maſter or ſteward, under pain of the loſs of one month's wages, and a greater puniſhment if deſerved; and if they deſtroy the bread, ſpoil the drink, make the ſhip leaky, excite ſedition to break the voyage, or ſtrike the maſter, having arms in his hand, are to be puniſhed with death; and ſailors ſleeping on the watch, are to be put in irons for fifteen days.

By the laws of Wiſbuy, if the maſter diſcover that a mariner is infected with any contagious diſtemper, he might put him on ſhore on the firſt land he makes, without being bound to pay him any wages, if two or three mariners atteſt the fact.

Cowardice, and deſertion of their duty in fight, are alſo criminal even in the crew of a merchant ſhip.

By the laws of the Hanſe Towns, if they do not defend the ſhip againſt rovers, they loſe their wages. If they refuſe to aſſiſt, they are to be whipped as cowards and raſcals; and if the mariners are brave, but the maſter cowardly, he is

(86) 7 Term Rep. 157.

to be turned out of the ſhip with infamy. And other marine laws agree in theſe general ordinances.

As wages may be loſt or forfeited by the offences of the mariners, ſo they may alſo by misfortunes happening to the ſhip; a rule ſeemingly of much ſeverity, but wiſely adopted to augment the care and anxiety of the ſeamen about the ſafety of the ſhip, and alſo founded on the principle, that freight is the mother of wages; and the freight being loſt, out of which they were to ariſe, they periſh with it.

The Rhodian laws ordain, that if by the *negligence* of maſter and mariners any damage or ſhipwreck happen, they ſhall be anſwerable for it.—Part II. article 10.

The ſame rule is extended by implication to loſs by *misfortune* by the third article of the laws of Oleron (87), which ſays, that if any veſſel,

(87) Mariners wages are not payable if a ſhip be loſt or taken before the end of a voyage, Hernaman *v.* Bawden, 3 Burrow, 1845; and in that particular caſe the voyage, though to Newfoundland, and thence to Spain or ſome port in the Mediterranean, was holden one entire voyage. This caſe may appear to contradict the old deciſion in Edwards *v.* Child, 2 Vern. 727, (where the mariners had given bonds to the Eaſt India company not to demand their wages, unleſs the ſhip returned to the port of London; yet it was ruled, that as the ſhip had ſailed to India, and there delivered her outward-bound cargo, the mariners were entitled to their wages on the outward-bound voyage, though

through misfortune, happens to be caſt away, in whatſoever place it be, the mariners ſhall be obliged to uſe their beſt endeavours for ſaving as much of the ſhip and lading as poſſibly they can; and if they preſerve part thereof, the maſter ſhall allow them a reaſonable conſideration to carry them home to their own country.

The ſenſe of the laſt recited paſſage from the laws of Oleron evidently implies, that their wages are totally loſt by the loſs of the ſhip, except as far as goods are ſaved, and the money given to carry them home is a reward, and not part of their wages; and this is proved by the fifteenth article of the laws of Wiſbuy, which ſays the mariners are obliged, to the utmoſt of their power, to ſave and preſerve the merchandize, and for doing it, ought to be paid their wages, and not otherwiſe; and the ſame language is repeated in the forty-fourth article of the laws of the Hanſe Towns.

By an ordinance of Philip II. of Spain, in the year 1563, it is ordained, that ſeamen ſhall be bound to ſave as much as they can from ſhipwreck; and in ſuch caſe the maſter is bound to pay them their wages (88), and to give them a

the ſhip was taken on her return to England.) But there is no real contradiction, for in the former caſe, the veſſel went to Newfoundland in ballaſt, and there loaded with fiſh, ſo that the firſt port of delivery was to be in Spain.

(88) Quere. Doth it mean their whole wages, or only pro rata of the goods ſaved?

further reward for their labour out of the goods; but if the ſeamen refuſe to do their endeavour to ſave the goods, they ſhall have neither pay nor reward.

By the ordinances of the French marine, in caſe a ſhip be taken, or ſuffer ſhipwreck, and ſhip and goods be *entirely* loſt, the ſeamen ſhall pretend to no wages; but they ſhall not, however, be obliged to reſtore what has been advanced to them (89).

In England it has been ſettled, that if a ſhip do not return, but periſhes by tempeſt, enemy, fire, &c. before ſhe completes her voyage, the mariners ſhall loſe their wages; for if the mariners ſhall have their wages in theſe caſes, they will not uſe their beſt endeavours, nor hazard their lives, to preſerve the ſhip (90). It is ſaid, however, that if the ſhip be previouſly unladed, they ſhall get their wages (91), which muſt proceed on the principle of the freight having been earned.

This rule is recognized in many late caſes, and particularly in Abernethy *v.* Langdale (92), where

In 1784, in the caſe of the Warren Eaſt Indiaman, opinions were given, that the owners having inſured the freight, made no difference as to the ſailor's demand.

(89) See marine laws of France eſtabliſhed by Lewis XIV. in 1681.

(90) 1 Siderſin, 179. and 2 Lord Raym. 1212.

(91) Keble, 831.

(92) Douglas, p. 520.

a ſhip having been taken before ſhe completed her voyage, Lord Mansfield ſaid, that an officer or ſailor (93) ſuing for his wages, in that caſe, was entitled to nothing; for that freight is the mother of wages, and the ſafety of the ſhip the mother of freight (94). But if ſhe arrives at a port of delivery, wages are payable to the day of arrival, and for half the time of unlading.

Since the whole wages are not payable before the voyage ended or completed, conteſts will naturally ariſe on the queſtion, whether the voyage has been completed or no? This muſt depend on the ſpecial words of the contract; and all that can generally be obſerved is, that the unlading the ſhip, or coming to one or more ports of delivery, doth not neceſſarily conclude the voyage, much leſs a partial unlading; as, in the former caſe, the ſeamen may ſtill be wanting to conduct the ſhip home in ballaſt; and in the latter, it cannot be perfectly known whether the ſailor has been guilty of embezzlement or waſte, till the ſhip is totally diſcharged of her cargo.

(93) As to ſuits for wages, they are on the ſame footing, 1 Lord Raym. 397. 632.

(94) The veſſel in that caſe had two characters, one as a privateer, the other as a merchantman. Conſidering her in the latter capacity, the plaintiff failed for the reaſons above mentioned; and viewing her in the former, he was held not to be entitled to any wages, though he was ſent from the ſhip before the capture, as prize-maſter, on board a prize taken in the courſe of the voyage.

By many of the old ſea laws, which have been copied on this point by an act of the American States, the ſailor is entitled to one-third part of his wages at the firſt port of delivery; but I have heard ſtrong evidence that no ſuch rule prevails in Britain.

By the laws of the Hanſe Towns, the ſailor was entitled to one-third of his wages when he ſet ſail on the voyage, one-third at the port of diſcharge, and the other third when the ſhip returned home; and by the laws of Oleron, the maſter might lawfully retain part of his wages after the veſſel was unladen, until the ſhip was brought back to the port from whence ſhe came, unleſs he gave good ſecurity to ſerve out the whole voyage; and, in fact, in Britiſh ſhips the ſailor always gets part of his wages to fit him out, and more on the voyage; though he has no ſtrict right, I believe, to demand any until the ſhip comes back in ballaſt, or otherwiſe, to the port from whence ſhe came; and the laws of Wiſbuy ſeem to agree with ours. See article 31. And by the French ordinances of 1681, which Sir Wm. Scott juſtly calls *celebrated ordinances* (95), a ſeaman hired for a voyage muſt not leave the ſhip without a diſcharge in writing, till the voyage is ended, and the ſhip moored at the key and unladed (96).

If ſeamen bargain for a certain proportion of the ſhip's freight, inſtead of wages in money, in

(95) In his judgment on the Swediſh convoy.
(96) Section 22.

caſe freight is not to be had for her, when ſhe arrives at the port for which ſhe was bound, and ſhe muſt go farther in queſt of it, the ſeamen muſt go with her (97).

If a ſhip is ſtopped in a ſtrange country, or the mariners be forced to ſtop there for their freight, they ſhall all that time be maintained as uſual, but are not to demand extraordinary wages; and if any ſeaman leave the ſhip on account of her ſtay, he ſhall be corporally puniſhed (98). If the ſhip be forced to winter in a ſtrange country, they are not to get extraordinary wages; and if they endeavour to do ſo, are to forfeit half what they would have had (99).

A curious queſtion was ſtarted in a modern (100) or recent caſe, which aroſe before the power of ranſoming was taken away by the act of parliament, 22 Geo. III. ch. 25, viz. Whether if a ſhip were ranſomed, and proceeded on her voyage, the ſailors would be entitled to their wages, and the owners bound to pay them? Mr. Juſtice Buller held, that they would not be ſo entitled. "The ranſom," ſaid he, "is a new purchaſe of the ſhip, and it will "deſerve great conſideration before it is deter-"mined, that after a ranſom the owners ſhall be "liable to pay wages for the time which elapſed

(97) Wiſbuy, 32.—(98) Hanſe Towns, article 49.
(99) Ibid. 22.
(100) Yates v. Hall, 1 Term Reports, 797.

" *before* the capture: no authority has been cited " to ſupport that poſition, and *the general rule* " *of law is, that if the ſhip be captured, the wages* " *are loſt.* If the ſailors be entitled to wages for " the *remainder* of the voyage (which has not yet " been determined), that right muſt be founded " purely on equity; and then to bind the owners " perſonally, it would be incumbent to ſhew that " the owners had accepted the ſhip; for if they " abandon her, the ſhip, as far as they are con- " cerned, is to be conſidered as if not ranſomed " at all."

This power of ranſoming being done away by 22 Geo. III. ch. 25. ſuch queſtion cannot now occur, unleſs that act ſhould be repealed.

Though it is laid down in ſuch general terms, that by the loſs of the ſhip all the wages are loſt, this rule, as I conceive, only applies in this extent to caſes of total loſs; for if part of the cargo be ſaved, and the ſailors have uſed their utmoſt exertions to ſave it, they ought to be paid in proportion to the value of the freight of the goods ſaved.

Thus the old law of the French marine ordains, that if ſome part of the ſhip be preſerved, the ſeamen ſhall be paid the wages that are due to them out of the wreck they have preſerved; and if there be only goods ſaved, the ſeamen, even thoſe that are engaged by the freight, ſhall be paid their wages by the maſter proportionably to the freight he receives; and whatever way they

be hired, they ſhall be over and above paid for the time they are employed in ſaving the wreck and goods. The ſame rules are adopted in almoſt all marine codes, and, as I conceive, furniſh an excellent guide to us (101).

The demerits of the ſeaman *during* a voyage, and their conſequent effects, have been conſidered. I proceed to review the privileges to which the well-deſerving ſailor is entitled.

If he is diſmiſſed by the maſter during the voyage without ſufficient cauſe, he is bound to pay him his whole wages, and defray the charges of his return. But if a ſhip is forced to winter in a ſtrange country, by the laws of the Hanſe Towns, ſailors get no *extra* wages.

If the maſter deviates from the voyage contracted for, he ought to have the conſent of his mariners, or pay them what the major part ſhall adjudge to be due for the change, by the laws of the Hanſe Towns, article 24.

By the Wiſbuy laws, the mariner, though diſmiſſed by the maſter for cauſe, if he compenſates for his fault, and the maſter will not receive him, is to have his whole wages.

(101) The French marine code, formed in Louis the Fourteenth's reign, from which the above is quoted, was ſyſtematical and excellent. The French of this day, who delight in annulling every thing conſtituted in former days without diſtinction, have departed from it. It is ſurpriſing that we have not a more regular and detailed marine code of our own.

If by ſhipwreck, capture, or other accident, ſailors are left abroad, they are to be ſubſiſted at ninepence per day by the governors, miniſters, or conſuls, and ſent home as ſoon as may be, by 32 George III. ch. 33.

If the maſter of a merchant ſhip, during, his being abroad, force any man on ſhore, or wilfully leave him behind in the plantations or elſewhere, or refuſe to bring home all the men he carried out, if able to return, he is to ſuffer three months impriſonment, by 11 and 12 William III. ch. 7.

If a ſhip be ſeized for debt, or for having contraband goods on board, it has been held that the ſailors have a right to their wages up to the time of ſeizure; becauſe, though the voyage was never completed, that was owing to the act of the owner, and not to any negligence of the crew (102).

If a ſailor becomes ſick during the voyage, and is left on ſhore, he is by the laws of Oleron entitled to his whole wages, after deducting what has been laid out for him; and in conformity with this rule, in a late caſe at law, the jury gave a verdict for the whole wages to a ſailor who had been put on ſhore for a broken leg, and the court refuſed to grant a new trial (103).

(102) See Langdale and Abernethy in Douglas, and Viner's Ab. tit. Mariners.

(103) Chandler *v.* Greaves, 6 Term Rep. 325.

The laws of Oleron (104) were particularly humane upon this ſubject, for they direct the maſter to furniſh the ſick ſailor put on ſhore with lodging and candlelight, and alſo to ſpare him one of the ſhip's boys, or hire a woman to attend him, and likewiſe to afford him ſuch diet as is uſual in the ſhip for men in health; and provide, that if he dies, his wages unpaid ſhall go to the next of kin.

The laws of Wiſbuy and of the Hanſe Towns agree upon this ſubject with the laws of Oleron; but the ordinances of Charles V. give to the next of kin but half the wages, if the death was on the outward-bound voyage; and the Spaniards in the Weſt Indies had a hard cuſtom of giving no wages to the ſick, unleſs they got ſubſtitutes.

If a mariner be impreſſed, he doth not loſe his wages (105). And here it may be uſeful to mention in what caſes naval perſons (though not enjoying any ſpecial protection, ſuch as the watermen on the Thames, are generally reputed to have) are by ſtatute exempted from being impreſſed; and this is where they are of the age of fifty-five, and under eighteen, and for the firſt two years of their going to ſea; and if they are foreigners, ſerving in any of our merchantmen or privateers; and every perſon who, not having before uſed the

(104) Article 7.

(105) Wiggins *v.* Ingleton, 2 Lord Raymond, 1211, ſaid by Lord Holt.

ſea, ſhall bind himſelf apprentice to the ſea, for three years after he ſo binds himſelf; and to all the perſons above deſcribed the lords commiſſioners of the admiralty are to grant protections (106).

If a ſeaman is wounded in the ſhip's ſervice, he ought to be cured at the expence of the ſhip; but if he is wounded in riots and quarrels, he muſt pay his own charges, by all the old maritime laws.

By a celebrated act of the 20th George II. a corporate company was eſtabliſhed for the relief and ſupport of ſick, maimed, and diſabled ſeamen—and of the widows and children of ſuch as ſhall be killed, ſlain, or drowned in the merchants' ſervice; and long before, by an act 13 and 14 Chas. II. ch. 11. officers and ſeamen wounded in defending an Engliſh ſhip, on petition to the court of admiralty where the ſhip ſhall arrive, ſhall have ſuch ſum of money as the court ſhall judge reaſonable, to be raiſed upon the owners.

By a peculiar privilege, ſeamen and mariners are alſo entitled to diſpoſe of their wages and perſonal effects, as before the ſtatute of frauds (107).

The proviſions of the Conſolato del Mare, as to ſeamen deceaſed, are extremely worthy of obſervation: they are contained in the 125th chap-

(106) 13 Geo. II. ch. 17.

(107) In England, by 29 Chas. II. ch. 3. In Ireland, by ſtatute 7 Wm. III. ch. 12.

ter.—" *Se Marinaro che ſara amaláto, & morira* " *nella nave, debba eſſere pagato di tutto il ſuo* " *ſalario, & ſe ci fuſſe alcuno parente ſuo, a quello* " *ſieno date le coſe di colui, e ſe quello che morte* " *ſara, haveſſe detto, o non haveſſe detto, ſi a dato* " *alle figliuóli o alla mogliera, ſe con lui ſtava quando* " *il marito era vivo, e ſe la mogliera non fuſſe leále,* " *o non ſteſſe con lui quando ſi parti della patria,* " *o che fuſſe fugita, il patrone della nave & ſcri-* " *vano, con licencia della corte alli parenti piu ſtrétti* " *lo debba dare* (108)."

We come now to the termination of the voyage, which, as we have ſeen, is not completed by the unlading of the cargo, or coming to a port of delivery (unleſs there be ſome ſpecial agreement to that purpoſe) but by arriving at the port from whence ſhe ſet out, if the contract was for the whole voyage and not by the run or freight, firſt premiſing that at the unlading port or port of diſcharge, the ſailor is not to be wantonly delayed, but the ſhip ought to be unladen with all poſſible diſpatch (109).

(108) " If a mariner die on board, all his wages muſt be " paid; and if he had any relation on board, to him his " effects are to be delivered; and, whether the deceaſed " ordered it or not, are to be ſent to his children and to his " wife, and if ſhe lived with him in his life-time; but if " his wife was not loyal to him, or refuſed to cohabit with " him when or before he left home, or had eloped, the maſter " or clerk of the ſhip, with conſent of the court, was to take " care to have his effects given to his neareſt relations."

(109) Wiſbuy, article 52.

Still, when ſhe does arrive at her original port, controverſies perpetually ariſe as to the remaining duty of the ſailors, and the exact time when they are entitled to their diſcharge, ſailors often pretending that, after unloading the cargo into lighters, for perhaps miles below the quay, their duty is at an end. It is neceſſary, therefore, that they ſhould know, that by the ſea laws it is forbidden to any mariner to go out of the ſhip and leave it, after the voyage is done and the ſhip diſcharged, until her ſails are all in, her furniture taken away, and ſhe is ſufficiently lightened of her ballaſt (110); by which I underſtand ſufficiently lightened to bring her up to the quay, or cuſtom-houſe, becauſe the captain certainly has a right, if the water be too ſhallow to allow the veſſel to ſail up, to put the cargo in hoys, lighters, or barges; and yet it would be abſurd, in my humble judgment, to ſay he muſt hire another crew merely to bring his veſſel up the river, and to take down the rigging. Certainly, in ſuch a caſe, the ſailors are not to be delayed, by loſing an unneceſſary moment in unloading into the barges; but the delay, as it ſhould ſeem, could not be of more than a day.

The ſailor's duty being diſcharged, the maſter is to pay him finally; and by ſtatute (111), on the

(110) Laws of Wiſbuy, 54; and ſee 27th article of laws of Oleron.

(111) 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. ſec. 7. The Conſolato del Mare ſays, in cap. 135.

arrival of any veſſel in Great Britain from parts beyond the ſeas, the maſter ſhall pay the ſeamen their wages, if demanded, in thirty days after the veſſel being entered at the cuſtom-houſe (except when a covenant ſhall be entered into to the contrary), or at the time the ſaid ſeamen ſhall be diſcharged, which ſhall firſt happen (deducting out of the wages the penalties by that act impoſed), under penalty of paying to ſuch ſeaman that ſhall be unpaid, twenty ſhillings over and above the wages to be recovered; and ſuch payment of wages ſhall be good in law, notwithſtanding any action, bill of ſale, attachment, or incumbrance whatſoever. The ſhip, in fact, is pledged to them in preference to any other creditor.

By the laws of the American States, all wages, when the voyage is ended, are to be paid in ten days, or immediately, if the veſſel is to depart again.

Suits for ſeamens' wages muſt be commenced within ſix years after the cauſe of action accrues (112).

Sailors in his majeſty's ſervice cannot be arreſted for debts under twenty pounds.

" Patrono di nave e tenuto a marinari, che del nolo che li " ſara pagato, lui debba pagare a detti marinari, & ſi il nolo " non baſta, lui ſe ne debbi fare impreſtare, & ſi non trovera " chi ne gli preſti, la nave ſi debba vendere." And again, ch. 136. " Padrone e tenuto pagar gli ſalari alli marinari in " quel loco, dove lui ricevera il nolo."

(112) Fourth of Anne, ch. 16.

Having conſidered the duties and rights of naval perſons, as far as they can be collected poſitively from our own maritime law, or by analogy from others, we proceed to make ſome few obſervations on the moſt uſual maritime contracts which affect them, thoſe relative to freight, charter-party, hypothecation, and average (113); all of which are, or ought to be, cognizable in the admiralty; nor do I ſee how that court could refuſe to entertain them, or proceed on them, unleſs when prohibited.—Theſe ſubjects cannot be pretermittal, though too trite to admit novelty, and too copious to ſuffer within our compaſs much more than definition and general principle.

OF CHARTER-PARTIES.

Charter-party *(charta-partita)* is the ſame in the civil law with an indenture at the common law, and is with us uſually applied to the agreement made between owners of ſhips and merchants, who agree to hire the ſhip for the carriage of goods, and to pay therefor a ſum or conſideration, which is called freight. Our reaſons for holding that the breach of theſe charter-parties, ſo that the penalty be not demanded, ought to be cognizable in the admiralty, have been already given.

(113) The contract of inſurance, being now in practice uniformly and decidedly out of the cognizance of the admiralty, is not here conſidered.

If the maſter enter into a charter-party for himſelf and owners, he may releaſe the freighters, without adviſing with the owners, otherwiſe not, though he has ſubſcribed the charter-party (114).

The charter-party ought to contain the name and burthen of the veſſel, the name of the maſter and freighters, the place and time of the lading and unlading, the freight (115), the time the veſſel is to ſtay at the reſpective ports, and the conventions about demurrage, with penalties on both ſides for non-performance.

If the time of lading and unlading be not regulated by the charter-party, it muſt be determined by the cuſtom of the port. If the time of the freight be omitted, it ſhall only commence from the day the ſhip ſails.

A complete embargo, occaſioned by war or repriſals, diſſolves the charter-party; a temporary ſtopping of a port doth not.

Bills of lading differ from charter-parties, in that they relate to part only of the cargo; whereas the other are made with thoſe who freight the whole ſhip. They ſhould contain the quality, quantity, and mark of the goods; the names of the perſons lading, and of the conſignees; the places of departure and unlading; the names of the maſter and ſhip, and the value of the freight;

(114) Beawe's Lex Mercatoria, 133.

(115) *i. e.* the ſum to be paid for freight, for ſometimes the cargo is called the freight.

and they ſhould be triple, one remaining in the hands of the lader, another in the hands of the maſter, and the third ſent to the conſignee. They are ſometimes diſtinguiſhed from charter-parties, in that they determine the contents of the cargo; while the charter-party ſettles the terms of carriage.

The indorſement and delivery of a bill of lading is, *prima facie*, an immediate transfer of the legal intereſt in the cargo (116). But where the intention of the parties appeared to have been only to bind the net proceeds, in caſe of the arrival of the goods, an inſurance on account of the indorſer, after ſuch indorſement, was held good (117).

Where ſeveral bills of lading of different imports have been ſigned, no reference is to be had to the time when they were ſigned by the captain, but the perſon who firſt gets legal poſſeſſion of one of them, by delivery from the owner or ſhipper, has a right to the conſignment (118).

OF FREIGHT.

By *freight* is uſually meant the ſum agreed upon between the merchant and ſhip-owner for the hire of a ſhip, or carriage of goods. The

(116) Hibbert *v.* Carter, 1 Term Reports, 745.

(117) Ibid.

(118) Caldwall *v.* Ball, 1 Term Reports, 205.

ſhip may be hired either in part, or in the whole, for an entire voyage, or by the month. It may ariſe not only by the terms of a charter-party, or by a verbal agreement, but alſo by common uſage, the amount in ſuch caſe to be determined by the cuſtom.

The cargo is tacitly bound for the freight, which is preferred to all other debts affecting the cargo, though prior in time; and if the cargo be damaged, the owner of the cargo has in his turn his remedy againſt the ſhip or its owner.

If either party fails in his part of the contract, the other is free, (though it may be imprudent too rigidly to inſiſt on the ſtrict letter of the agreement.) And he has alſo his remedy in damages againſt the party who failed in fulfilling his contract.

Let us compare the old maritime laws on this ſubject with modern deciſions.

By the old marine laws, if a ſhip be ſo diſabled that ſhe cannot proceed in her voyage, the merchants, on their goods being returned to them, were to pay freight in proportion to the way the ſhip has made (119); or the maſter may hire another ſhip.

If the cordage was good in itſelf, and any accident happened by its breaking, the damage was equally divided between the merchant and

(119) Laws of Oleron, article 4th.

ſhip (120); at preſent this is uſually provided for in the charter-party.

If the merchant delayed the ſailing of the ſhip fifteen days beyond the time within which by his agreement ſhe was to be laden, he was to make ſatisfaction for the delay (121). In our modern charter-parties, a time is mentioned, uſually ten days.

It was not lawful to ſell or mortgage a ſhip let out to freight, but it was lawful to freight it, or underlet it to others for the ſame voyage (122).

If the voyage fail by the act of God, or that of an enemy, the freight was not loſt.

If a ſhip freighted for a voyage was ſent upon another, and longer, and no proteſtation againſt it, the freighter was to pay but half the damage that might happen to ſuch ſhip, in ſuch longer voyage or voyages (123).

If a ſhip freighted for one port enter another, the maſter, together with two or three of his chief mariners, ought to clear themſelves upon oath, that it was by conſtraint and neceſſity they went out of their way (124). So if the voyage be prevented by embargo, freight was not to be paid.

The maſter might always retain the merchandize until paid his freight (125). Whether he

(120) Laws of Oleron, article 10.—(121) Ibid. article 21.
(122) Laws of Wiſbuy, article 10.
(123) Ibid. article 11.——(124) Ibid. 53.
(125) Ibid. 57.

has any lien on them when let out of his hands, has been diſcuſſed before (126); and goods once delivered to the maſter, were not attachable in his hands.

Let us now ſee how far modern determinations agree with theſe ancient rules.

It is ſaid, that by the law of England, freight is not payable if the goods are loſt by piracy or ſhipwreck, though the civil and marine laws are otherwiſe. Bright and Cowper, Brownlow. But ſee Douglas, cap. 464. contra.

In caſe of embargo, the charter-party is diſſolved without charges to either party; the merchant is to pay for unloading his goods.

If a ſhip is freighted to go to any place to load, and on arrival there the factor cannot, or will not, put any thing on board her, after the maſter has ſtaid the days agreed on by the charter-party, and made his regular proteſts, he ſhall be paid empty or full.

When a ſhip is freighted out and home, there is no freight due till the whole voyage be performed, ſo that if ſhe be caſt away coming home, the freight outwards, as well as inwards, is loſt; and ſo in a very modern caſe it was ruled, that if the charter-party covenant that goods be delivered at one place, freight cannot be recovered *pro rata itineris*, if the ſhip be wrecked at ano-

(126) See Smart and Wolf, 3 Term Reports, and Douglas, p. 100. Bright and Cowper, Brownlow, part 2d.

ther before her arrival at the latter, though the defendant accepted the goods at the former (127).

If one let his ſhip for a voyage, agreeing to keep it in repair during the whole time, and the ſhip for its ſafety is obliged to put into port to refit, he bears the whole expence (128).

If a freighted ſhip becomes diſabled on its voyage accidentally, and without any fault of the maſter, the maſter has his option either to refit it (in convenient time) or to procure another ſhip to carry the goods. If the freighter diſagrees to this, and will not ſuffer it, the maſter ſhall yet be entitled to his whole freight, as of the full voyage. — And the maſter (if in no fault) is at all events, and though he neither refits his own ſhip, nor procures another, entitled to freight *pro rata itineris*, i. e. in proportion to ſuch former part of the voyage as he has already performed. The value of the goods, or what they ſell for, or whether they were ſpoiled or not, was nothing to the maſter, becauſe the freighter took them; and he muſt take all that was ſaved or none. But the maſter had earned his freight by carring them. If he had abandoned all, he had been excuſed freight. Theſe rules, laid down by Lord Mans-

(127) 7 Term Reports, p. 381.

(128) 8 Term Reports, p. 509.

field in a modern caſe (129), will be found to originate in, and not materially to differ from, thoſe of the ancient maritime laws above cited.

Theſe caſes and rules reſpecting freight, ſeem reducible to one or two general principles of reaſon. Accordingly as the maſter or owner of the ſhip, or the merchant freighting, incurs the blame of miſcarriage, or failure of undertaking, freight is or is not to be paid. If there be in any caſes an apparent deviation from this rule, and a ſeeming want of equity, it ariſes from the ſpecial nature of the agreement, and the time, terms, or mode for, on, or in which the ſhip is let or taken to freight. If none of the contracting parties are in fault, and the failure is occaſioned by an act of government, neither party ſuffers. If by the act of Heaven, or of an enemy, the ancient and modern laws are ſaid to differ, though I believe they do not.

OF HYPOTHECATION AND BOTTOMRY.

This contract originated with the Roman law. In the law *de exercitoria actione*, in the Pandects, it will be ſeen that the maſter might, from neceſſity, take up money on the credit of the ſhip; and in their laws, de nautico fœnore, ſome ſmall regulations are mentioned on the ſubject; but

(129) 2 Burrow, from 887 to 891. Compare this with the laws of Oleron, Article 4.

bottomry, as at preſent underſtood and practiſed, is a contract which has grown up to importance even ſince the time of Grotius, who has given therefore little information on the ſubject.

Bottomry is a contract for money lent upon the veſſel, on condition, that if the ſhip be loſt, the lender loſes his money; but if the ſhip return in ſafety, he is to receive his principal, and alſo intereſt, even beyond the legal rate, on account of the extraordinary hazard, and for the benefit of commerce (130). The maſter, as we have ſeen, cannot hypothecate the ſhip, except for its own neceſſities, and that abroad; and the veſſel itſelf is thereby ſubject to ſeizure in the court of admiralty to ſatisfy the debt, but no one is perſonally liable. And in the common caſe of money lent on bottomry to the owner, the ſhip and tackle, if brought home, are liable, as well as the perſon of the borrower; the latter, by his expreſs contract, the former both by that and the maritime law; it has been already ſtrongly argued, that the former part of the contract at leaſt ought to be cognizable in the admiralty.

Hypothecation then may be diſtinguiſhed from bottomry; the former uſually ſignifying the pledging of the ſhip or cargo by the maſter abroad; which binds only the ſhip. The latter, a con-

(130) See Molloy de Jure Maritimo, 361. Malyne's Lex Mercatoria, book 1. ch. 31. Bynkerſhoek, lib. 3. ch. 16. De contractu qui dicitur bodemery.

tract by the owner at home, binding by his own words both ſhip and perſon.

If the money be lent on the goods or cargo at home, the borrower alone is perſonally liable, and is ſaid to take up money at *reſpondentia*.

If the money be borrowed not on the ſhip and goods, but on the mere hazard of the voyage, this agreement was ſometimes called alſo bottomry or reſpondentia,—and ſometimes fœnus nauticum & uſura maritima; but this giving an opening for gaming contracts, was curbed by ſtatute 19 Geo. II ch. 37. enacting that all monies lent on bottomry or reſpondentia, on veſſels bound to or from the Eaſt Indies, ſhould be expreſsly on ſhip or cargo, that the lender was to have the benefit of ſalvage (131), and that if the borrower had not an intereſt in the ſhip or effects, equal to the ſum borrowed, he ſhould be reſponſible, though the ſhip were totally loſt.

By the Roman law, every contract of the maſter's, not exceeding his authority from the owners, bound them: they authorize him abroad to hypothecate the ſhip, but whether to bind them if the ſhip be loſt, or beyond its value, and that of the cargo, has been a verata quæſtio, by us diſcuſſed before.

(131) Bynkerſhoek holds that he is ſo in every caſe, and that the lender cannot ſuffer if the voyage be changed, any more than an inſurer; otherwiſe his riſk continues to the very laſt port.

It is ſaid in Juſtin v. Ballam, 2 Lord Raymond, 805, that every contract of the maſter is an implied hypothecation of the ſhip by the maritime law. In what maritime law is this ſaid? It was not in the Roman law. It produced indeed a lien by that law, and a priority to other creditors, but that lien was enforced by the *actio in factum*, and was very different from an hypothecation, for which the redreſs was by the *actio hypothecaria*.

AVERAGE.

Average is a word of ambiguous ſignification, ſometimes meaning the damage incurred for the ſafety of the ſhip and cargo; ſometimes the contribution made to repair that damage. It is moſt commonly taken for that contribution which merchants and others do proportionably make towards their loſſes who have their goods caſt into the ſea for the ſafeguard of the ſhip, or of the goods and lives of them in the ſhip, in time of tempeſt (132).

It is either general or particular. *General* average is for a loſs incurred, towards which the whole concern is bound to contribute *pro rata*, becauſe it was undergone for the general benefit and preſervation of the whole. *Simple* or *particular* average, means damage incurred by, or for, one part of the concern, which that part muſt bear alone; ſo that in fact, it is no average

(132) Molloy, book 2. ch. 6.

at all, though the expreſſion be in familiar uſe (133).

The great principle of average, or which determines whether parties ſhall contribute or not, is the loſs having been ſuffered, or the act done voluntarily, for the benefit of the property of the contributors. It is not their conſent, for goods may be thrown overboard againſt their conſent, if the majority of the mariners or perſons on board think it neceſſary; though it is at the peril of thoſe who do ſo, if the neceſſity be afterwards diſproved; nor is it every loſs, for if maſts or yards be deſtroyed by the force of a tempeſt, and not voluntarily cut away to prevent danger, there is no contribution for the repairs of the ſhip; upon this ground it has been determined with ſome ſubtlety, that when the cable was cut to ſave the ſhip, there was no contribution for the anchor loſt, the will not having extended thereto; and it has been diſputed whether, when a ſhip was voluntarily run aſhore and loſt, but the cargo ſaved, it ſhould contribute, becauſe the rule was, that no contribution took place when the ſhip was loſt; but it was truly held that the rule would be abſurdly applied to a caſe where the ſhip was grounded purpoſely to ſave the merchandize, and that with ſucceſs.

In illuſtration of the ſame principle, let me

(133) 2 Robinſon, p. 293.

add, that it has been held, that where a ſhip has been driven on ſhore by a tempeſt, and the cargo ſaved, it ſhall not contribute to the loſs of the owner of the ſhip, for the ſhip was not expoſed to the danger voluntarily for the benefit of the cargo; and on the other hand, when the cargo put into lighters (the ſhip not having depth of water to come higher up the river) has been loſt, the ſhip doth not contribute, for its benefit was not in contemplation in the unloading into the lighters.

Other caſes occur of more difficulty, e. g. if the neceſſity of throwing goods overboard ariſes from the mariners' miſconduct in the manner of loading the ſhip; here the better opinion ſeems to be, that if the mariner be ſolvent, he ſhall pay the damages; if not, though he alone was the offender, yet, as when the danger occurred, all were the benefited by the *jactus*, all ſhall contribute.

Contribution is not confined to the inſtance of goods thrown overboard. It may extend itſelf to many other caſes. e. g. if a ſhip be ranſomed, where ranſoms are legal, all the owners of ſhip and goods contribute, for it is for the benefit of them all.

Our next conſiderations are, in caſes where contribution is proper, who ſhall contribute, what ſhall contribute, and how the goods loſt are to be eſtimated?

All perſons(134), for whoſe benefit the act was done, the freighters, the maſter, the owners, the ſailors, the paſſengers, muſt contribute. The ſailors only are allowed, by the old marine laws, a certain little *peculium* free from contribution.

All things in the ſhip, except the victualling and proviſions of the ſhip, and the bodies of the men (unleſs ſervants) muſt bear a proportionable ſhare in the contribution. Doubts were formerly held, whether money and jewels contributed, but they are now certainly included in the general rule.

The goods ſaved and loſt are to be eſtimated according as the goods ſaved were ſold, freight and all neceſſary charges being firſt deducted, and then a proportionable value is to be contributed by the goods ſaved.

The maſter ought not to deliver the goods till the contribution is ſettled, they being tacitly pledged, as they are for the freight (135).

LAW OF TORTS.

If a wrong be done to the perſon civiliter upon the ſeas, though the caſe of Le Caux and Eden related to the prize court, yet, as has been before obſerved, the reaſoning therein appears to me to apply to the inſtance court, and to ſhew that in

(134) Bynkerſhock, Quæ. Juris privati. cap. 24. Molloy, book 2. ch. 6. ſec. 14.

(135) Molloy, paſſim.

any ſuch caſe redreſs may be had in the admiralty; the damages to be aſſeſſed by the regiſtrar in the manner pointed out by that caſe. ✳

If the injury was done to the property upon the ſeas, (for in the caſe of torts I admit that locality not only is, but ought to be, the criterion of juriſdiction); in like manner remedy is properly had in the admiralty.

In the former caſe, the perſon is arreſted; in the latter the ſhip, by the mere common proceſs of the Roman law *in rem* (136).

The poſitions which I have here laid down ſeem to me to be fully confirmed by the following opinions (coming from a very high authority indeed) as indeed they are by common practice.

In the reign of King Charles II. France being at war with Holland, a Dutch caper ſeized two Engliſh ſhips, robbed them of their cargoes, alleging them to be French, and put the crews to the torture; though by the law of nations, free ſhips do not make free goods; yet by an expreſs treaty with Holland at that time, French goods in Engliſh bottoms were not ſeizable.

In a letter from Sir L. Jenkins to the lords of the admiralty, Vol. II. p. 774. who had conſulted him on this affair; he ſays, the owners

(136) In caſes of colliſion, the perſon is not arreſted. Doth not this ſhew again that the arreſt of the maſter or owner for ſeamens wages muſt be on their perſonal contract?

and maſters of theſe Engliſh veſſels have a good action of ſpoil and damage, *as we term it*; nor do I know that this action can be any where but before your lordſhips in the court of admiralty, where the merchants and owners are to proceed by proceſs, in order to be repaired, againſt the ſhip and the commander; the merchants for the loſs of their goods, the owners for the ſhip's loſs of time, and being forced out of its courſe.

As to puniſhing the captain for his threats, and his officers for torturing the pilot, the way is at the admiralty ſeſſions of oyer and terminer.

In the mean time the men may be committed to the *Marſhalſea*, and the ſhips continue *under arreſt*.

In another place he declares, that an action of trover for a tort at ſea, is an invaſion of the rights of the admiralty (137).

Of torts or injuries done to things, that of moſt frequent occurrence in naval affairs, is the running foul of one ſhip againſt another, or the impinging upon an anchor, or other injurious impediment negligently left in the way.

This may either happen where two ſhips are too near each other in port, or where one is at

(137) The Marſhalſea then appears the proper priſon; and arreſt of the ſhip the proper proceſs, when acting *civiliter*, 2 vol. 777.

anchor, the other under ſail; or where both in ſailing ſtrike together.

The Roman law ordained, that if the injury happened by accident, and without the fault of either party, that it was to be conſidered as the decree of fate, quietly to be ſubmitted to by the ſufferer, without his being entitled to any reparation; but if the party occaſioning the accident was in fault, he was to make full reſtitution and reparation to the injured (138).

The Laws of Wiſbuy, which are particularly regarded and followed in Holland (139), require maſters of ſhips to faſten buoys to their anchors, on pain of paying for all damage that may happen from the want of them; and ordain, that if a ſhip under ſail doth damage to another, the damage is to be borne by the ſhip that did it, unleſs her mariners ſwear they could not help it, and then to be borne by each equally (140).

By another article of the ſame laws of Wiſbuy (141), if two ſhips ſtrike againſt one another, and receive damage, the loſs ſhall be borne equally between them, unleſs the men on board one

(138) See the Aquilian law, and Bynkerſhoek's Commentary on it.

(139) Quibus nos fere utimur, ut Romani legibus Rhodiis, ſays Bynkerſhoek.

(140) Articles 29, 51 and 71.

(141) Articles 50 and 67. See a remarkable caſe of Briggs v. the Perſeverance in the Appendix.

of them did it on purpoſe; in which caſe that ſhip ſhall pay all the damage. And if two ſhips ſtrike againſt one another (I ſuppoſe it is here meant by accident) and one of them unfortunately periſhes, the merchandize that is loſt out of both of them ſhall be valued and paid for *pro rata* by both owners, and the damage of the ſhips ſhall alſo be anſwered for by both, according to their value.

This ſubject has been very accurately and minutely conſidered by Bynkerſhoek, and the purport of his obſervations, which ſeem to me worthy of being here inſerted, is as follows (142):

Where the damage was done by deſign, the Roman law is followed, but the mercantile world was not reconciled to the idea, that where it happens by accident, the doer of it ſhould be perfectly free from the obligation of making ſome payment or retribution, becauſe if ſo, it would always be imputed to accident, and it would often be extremely difficult to prove the contrary; on the other hand, if the principles of the *noxal* action of the Romans, and of the action de *pauperie* were here applied, viz. that the thing which was the immediate cauſe or inſtrument of damage, ſhould be given up, or otherwiſe the whole damage paid, it would be too ſevere a rule to be applied,

(142) Quæſtiones juris privati, from the 18th to the 23d chapter incluſive. He himſelf ſays, the law on the ſubject much wanted an interpreter.

if the caſe really happened by accident and misfortune: they therefore choſe a middle courſe. In caſe of accident, the loſs was to be divided between both parties, in equal proportions; in caſe of wilful fault or negligence, the guilty perſon was to pay the whole.

In caſe of accident, however, the party may, if he pleaſes, relinquiſh the veſſel from which the miſchief proceeded, with analogy to the Roman actions above-mentioned, and that of *damnum ab ædibus ruinoſis datum.*

In this caſe of accident (though by the Roman law, if there be a number of owners, the act of the maſter makes each of them liable *in ſolidum*, or for the whole) each owner is only liable to contribute in proportion to his ſhare, for that rule of the Roman law applies only to acts which the maſter is authorized to do; and Bynkerſhoek humorouſly obſerves, "he is not authorized or "inſtructed to run down ſhips."

If the injury has happened through fault, and that the fault of the ſufferer, e. g. by not carrying lights at night, he plainly gets no reparation. If by the fault of the other, he pays the whole damage; but Bynkerſhoek imagines that the maſter of the ſhip only is liable, it being an act not authorized by the owners; and this may ſo far be true, that the owners ſhall not be liable beyond the value of the ſhip (143).

(143) The principle followed on the continent, and that of the civil law, is, that abandoning the ſhip in ſuch a caſe, doth not diſcharge the wrong doer.

Theſe doctrines, adopted by the great Dutch juriſts, are certainly guides in our courts. The various caſes of ſuch damage, as one ſhip may be at anchor, or both under way, &c. are well put in Roccus.

The laws of Oleron ſay, that if a veſſel moored and lying at anchor be ſtruck by another veſſel under ſail, the damage ſhall be in common, becauſe old decayed veſſels have ſometimes been purpoſely put in the way of better; and if in harbour, where there is little water, the anchor of one lies dry, the other may remove it, and the party preventing him muſt anſwer the damage; and every ſhip not having a buoy to the anchor, is liable for any damage happening thereby. Articles 14 and 15.

CHAPTER VI.

ON THE JURISDICTION OF THE PRIZE COURT.

THINGS taken on the high ſeas, *jure belli*, out of the hands of the enemy, are things of prize (1); and all queſtions of prize at ſea belong *excluſively* to the admiralty juriſdiction (2).

In matters of prize, the rule which the civilian ſo much, ſo juſtly, but ſo unſucceſsfully, laboured to eſtabliſh in the inſtance court, is univerſally confeſſed and admitted; that the juriſdiction depends not on locality, but on the ſubject matter, which is governed by the jus belli, and not by the rules of the common law (3). The juriſdiction too is *excluſive*. A thing done upon the high ſeas, unconnected with prize, doth not exclude the juriſdiction of the common law: for inſtance, for the ſeizing, ſtopping, or taking a ſhip, not as prize, an action will lie; but for taking as prize, no action will lie. The nature of the queſtion excludes not the locality (4).

(1) 1 Robinſon, 283. (2) Douglas, 572 to 591.

(3) Douglas, 586. (4) Douglas, 592.

The hiſtory of the prize court has been deduced with great learning by Lord Mansfield, in the cauſe of Lindo *v.* Rodney. Yet I own, it doth not appear to me that the laborious reſearch of that ſuper-eminent judge has removed all obſcurity from the ſubject. That great man, indeed, obſerves himſelf, that his reſearches could not be extended to any high antiquity; that there were no prize-act books further back than the year 1641—no ſentences further back than 1648—and that, down to 1690, the records are in confuſion, illegible, and without an index.

He obſerves, that the juriſdiction in matters of prize (whether coeval with the court of admiralty, or, which is more probable, of a later date beyond time of memory) is quite diſtinct from the ordinary juriſdiction of the court of admiralty, though exerciſed by the ſame perſon; and that, in the ordinary commiſſion under the great ſeal, there is no mention of prize.

That to *conſtitute* the prize authority, or to *call it forth*, in every war a commiſſion under the great ſeal iſſues to the lord high admiral, to will and require, and authoriſe the court of admiralty, and the lieutenant and judge of the ſaid court, and his ſurrogates, to proceed upon all captures, ſeizures, prizes, and repriſals, of all ſhips and goods that are or ſhall be taken, and to hear and determine according to the courſe of the admiralty and the law of nations.

That the monition and other proceedings, after reciting his titles, add emphatically, "and alſo to "hear and determine all and all manner of cauſes "and complaints, as to ſhips and goods ſeized "and taken *as* prize, *ſpecially conſtituted* and ap- "pointed."

That the whole ſyſtem of litigation, proceeding, and juriſprudence, in the prize court, is peculiar to itſelf; and it is no more like to the admiralty, (*i. e.* to the inſtance court) than to any court in Weſtminſter hall. The inſtance court is governed by the civil law, the laws of Oleron, and the cuſtoms of the admiralty, modified by ſtatute law. The prize court is to hear and determine according to the courſe of the admiralty and the law of nations.

That the end of a prize court is to ſuſpend the property till condemnation; to puniſh every ſort of miſbehaviour in the captors; to reſtore inſtantly *velis levatis* if, upon the moſt ſummary examination, there do not appear ſufficient ground—to condemn finally, if the goods really are prize, againſt every body, giving every body a fair opportunity of being heard. A captor may and muſt force every body intereſted to defend, and every perſon intereſted may force him to proceed to condemn without delay.

That theſe views cannot be anſwered in any court of Weſtminſter hall, and therefore they have never attempted to take cognizance of the queſtion. *prize or no prize*, not from the locality or the act

being done at ſea, ſince for ſeizing a ſhip at ſea *not* as prize an action will lie, but from their incompetence to embrace the whole of the ſubject.—Douglas, 592.

All this is clear; but when the illuſtrious judge expreſſes his doubt whether the juriſdiction in matters of prize be coeval with the court of admiralty (5), or, which is more probable, of a later inſtitution beyond the time of memory—when he doth not inform us at what time a prize commiſſion diſtinct was firſt granted—and when he uſes the ambiguous expreſſion, that it is granted to *conſtitute* this authority, *or* to *call it forth* (6), thereby intimating a doubt whether it be not always, at leaſt latently, inherent; and leaving us at a loſs to know whether it could or could not be granted to any other perſon (7)—and when he

(5) Theſe are his words; he doth not ſay the *inſtance* court, but ſeems to diſtinguiſh the court of admiralty from the court of prize.

(6) The words of Sir James Marriott upon this ſubject are remarkably, if not ſtudiouſly, ambiguous.—"It is ſingu-"lar," ſaith he, "that in the patent of the judge of the "admiralty, no *particular* juriſdiction of prize is *expreſsly* "given."

I have ſeen an opinion of Sir W. Wynne, that though the admiralty of Scotland has no ſpecial prize commiſſion, yet it hath cognizance of prize cauſes under its general commiſſion. Sed quære, if it be like other general admiralty commiſſions?

(7) Douglas, 595.

afterwards ſays, "ſince Queen Elizabeth's reign, the judge of the admiralty, *either* by an inherent power, or by the king's commiſſion, *or* both, has ſolely exerciſed prize juriſdiction"—it ſeems pretty evident, that this great luminary of the profeſſion was not able, on this occaſion, to imbibe or to diffuſe clear and ſatisfactory light.

Without pretending to decide whether the admiral hath a right excluſively to claim the prize commiſſion whenever it doth iſſue (8), though the words of the monition above recited would ſeem to ſhew he has not (9), I ſtrongly ſuſpect that, before the laſt century, he did exerciſe a juriſdiction over prize without any ſpecial or diſtinct commiſſion; and certain it is, before Britain had a regular or royal navy, that the admiral, as we have ſeen in the chapter of droits, was entitled to a very conſiderable ſhare of prize ſhips or cargoes taken; beſides, no prize commiſſion having iſſued, as far as appears, in ancient times, how could he have then exerciſed the authority, unleſs it was conſidered as inherent?

Such being the nature and origin of the prize court, I next proceed to the extent of its juriſdiction as deſcribed by Sir William Blackſtone.

(8) Such a claim hath been very ſtrongly urged by the admiralty court in Ireland, where, indeed, it was inſiſted that the ordinary commiſſion included prize.

(9) For thoſe words are, *ſpecially conſtituted* and appointed.

"In caſes," ſays he, "of prizes, in time of war "between our own nation and another, *or between* "*two other nations*, which are taken at ſea, and "brought into our ports, *the courts of admiralty* "have an undiſturbed and excluſive juriſdiction "to determine the ſame according to the law of "nations."

On every part of this definition or deſcription it will be neceſſary to obſerve, becauſe in every part of it the learned commentator's words ſeem to be either erroneous or unguarded.

The firſt part, which ſays that the juriſdiction of which he ſpeaks extends to prizes between our own nation and another, leaves us at a loſs to know whether he includes queſtions as to captures by the enemy, where there has been no recapture, which has been, though I think unreaſonably, doubted. The ground of this doubt was, that we never can conſider a capture by the enemy, even followed by a condemnation in their courts, as binding upon us—as legal prize—or as altering the property. This I conceive to be manifeſtly falſe, though it was once, to my ſurprize, ſtrenuouſly urged in a court of juſtice. Suppoſe a ſhip taken by the enemy, and regularly condemned in their courts, ſhould, without recapture, by ſome *accident* or ſtreſs of weather, come into our ports; ſhe would, I conceive, become a droit of admiralty. Suppoſe ſhe had been purchaſed by a neutral, which purchaſes England allows, though France

doth not (10), and that the queſtion was, whether there had been a legal ſentence of condemnation to alter the property in a ſuit or claim made by the former Britiſh owner; ſurely the ſuit would be not in the inſtance court, nor by action at law, but in the prize court, the veſſel having been taken *as prize*, whether ſhe had become legal prize, and the property been altered or not (11).

Our law on this ſubject muſt have been the ſame with that of other nations; and Sir Leoline Jenkins obſerves in his time, that the parliament of Paris had determined, that ſhips are not recoverable *jure poſtliminii*, when they *happen* to return from an enemy's poſſeſſion to their own country; and that the laws of Spain and Venice allowed the property to be altered even in the hands of pirates.

(10) 1 Robinſon, p. 124.—the caſe of the Velvaart, and of the Juffrow Anna, both in the prize court.

(11) I have been more particular on this ſubject, becauſe an extraordinary idea was introduced in Ireland more than once, viz. that a queſtion between the neutral purchaſer of a ſhip taken by the French, under an illegal ſentence of condemnation in Norway, and the former owner (where the ſhip was ſent on a voyage to our ports by the purchaſer) was not a prize queſtion, but cognizable only at law, or in the inſtance court of admiralty. The caſe of the Perſeverance, 2 Robinſon, 239, which was in the prize court, is directly in point. In that of the Flad Oyen there was a recapture. But the caſe of the Kierlighett, 3 Rob. Rep. is deciſive.

The next poſition of Judge Blackſtone, that the juriſdiction of the prize court extends to queſtions of prize between two other nations, is, as I apprehend, abſolutely falſe, if the learned writer meant, as his words ſeem to import, that this is, while thoſe two other nations are at war, and we at peace. It never can be ſuppoſed, or preſumed, that a neutral government will ſo far depart from the duties of neutrality, as to permit the condemnation of the property of one belligerent to another, which would be a direct and avowed act of hoſtility. I will not ſay whether ſuch a condemnation would alter the property, but it would be an implied declaration of war. When, therefore, we read of condemnations in the ports of a third power being held to be valid, we ſhall find it was when that third power was alſo at war with the nation of the captured, and linked in alliance with the captors, and not when it was perfectly neutral. And ſuch was the late caſe of the Chriſtopher, in the ſecond volume of Dr. Robinſon's Reports (12).

So far from the neutral having any ſuch right, conſiſtent with a ſtate of peace, of condemning the property of one belligerent power to another,

(12) It is, however, laid down generally, that according to the law of nations, prizes may be brought into neutral ports to ſell them, by Bynkerſhoek, lib. i. ch. 15. Vattell, book iii. ch. 7. ſec. 132; and this opinion ſeems to be adopted by an able man, Dr. Kent, now profeſſor of law in Columbia College in America, in ſome diſſertations in my poſſeſſion.

it was formerly doubted whether it was not obliged by its amity with the captured (even where the ſhip was not taken within their dominions, but only brought in), to reſcue him and his property from the power and force of the enemy, and *jure poſtliminii* to compel reſtitution. This queſtion was put by his majeſty King Charles II. to his judge of the admiralty, who anſwered, "The law "of nations, as at this day obſerved, ſeems not to "paſs any obligation on your majeſty to impart "your royal protection unto one friend to the "prejudice of another; and the French ordinances "do expreſsly provide, that leave be given to all "ſtrangers to depart their ports with ſuch prizes "as they bring in, and this is the practice of "Spain and of all other ports."

The laſt thing to be noted in Sir W. Blackſtone's account of the extent of this juriſdiction, is his expreſſion, *the courts of admiralty* have an excluſive juriſdiction of prize. He would *ſeem* here to give an opinion, that this juriſdiction is either *inherent* in the courts of admiralty, or at leaſt, that when *called forth*, it can be exerciſed through no other channel. And yet the probability is, that the learned author was not thinking of any ſuch queſtion, nor meaning to give any opinion upon it (13).

(13) If we wanted any further proof of the looſe mode of expreſſion here uſed, the plural *courts* will ſhew it. What is meant? There is but one prize or high court of admiralty in England, with its dependencies. He cannot

It has been obſerved, that locality has no effect on the prize juriſdiction—it is co-extenſive with its ſubject matter, and pervades the land as well as the ſea

Hence it is that the prize court may adjudge of captures happening *on land* in conſequence of a naval force, which was the famous caſe of Lindo and Rodney already mentioned: and hence it is that prize goods, or goods taken on the high ſeas jure belli out of the hands of the enemy, when or

mean vice-admiralty courts; he cannot mean the prize and inſtance court. The truth is, Blackſtone's Commentaries are a moſt uſeful, great, and precious work, but by no means implicitly to be depended upon. Let not the author of this be ſuſpected of vanity: if he, or any elementary writer, be guilty of as few errors as Sir W. Blackſtone, he will be fortunate indeed. Such works as this bear no proportion in importance or extent to his, any more than in the abilities of the author: but let us not be blind. Beſides the political errors often marked in that great work, there are many legal ones. Take this inſtance, as yet I believe unnoticed. "An acquittance for rent," ſaith he, book iii. ch. 23, "in full "of all demands, is ſo violent a preſumption of all former "rent being paid, that no proof ſhall be admitted to the "contrary." Surely this is not law, though I admit it carries a ſtrong preſumption; and ſo where he ſays *generally*, and *without exception*, in book ii. ch. 30. that want of conſideration cannot be averred by the maker of a note. Can any thing be more inaccurate? Theſe, however, are ſlight maculæ on that tranſcendent work, and I ſhould be very far, on ſeeing on one of its ſmaller limbs any little defect, from miſapplying the old adage, *Ex pede Herculem.*

though they come on ſhore, may be followed by the proceſs of this court.

It is even a queſtion unſettled, whether the prize court hath not juriſdiction over plunder and booty gained in a mere continental land war, without the preſence or intervention of any ſhips or their crews. "It is often," ſays Lord Mansfield, in the caſe of Lindo and Rodney, "given to the "ſoldiers on the ſpot, or irregularly taken by "them, and diſputes regulated by the commander "in chief." But he proceeds to ſay, "there is "no inſtance in hiſtory of any queſtion about it, "before any legal judicature in this kingdom; and "perhaps, any attempt to claim juriſdiction over "it in the prize court of admiralty, might be op-"poſed by the ſubject matter, the nature of the "juriſdiction, the perſon to whom it is given, and "the rules by which he is to judge (14)."

The cognizance of the principal, as hath been repeatedly obſerved, draws that of the incident to it; and hence controverſies have ariſen whether certain matters were or not neceſſarily incident to a prize queſtion. I ſhall give one or two inſtances by way of illuſtration.

Whether the queſtion of freight muſt be determined by the ſame court which determines the principal queſtion of prize? e. g. Whether a neutral maſter muſt here claim againſt the captor who has taken goods as prize (15)? was one of

(14) Douglas, 592.

(15) See Smart *v.* Wolf, 3 Term. Rep. 332 and 336.

the queſtions diſcuſſed in a remarkable caſe. It was juſtly determined (16) that it was, and that the common law could not, in ſuch a caſe, take cognizance of freight; becauſe it involved in it the queſtion of prize, and whether or not the goods were contraband, and many other queſtions which depend on the treaties with foreign powers, of which the law courts know nothing, all which muſt be ſubjected to the deciſion of ſome forum (17), governed by the ſame rules in all countries.

Whether the claim of a former owner againſt a neutral purchaſer, in a neutral port, of a ſhip taken as prize (18), be proper for the inſtance or the prize court of admiralty, though in my humble opinion (19), no queſtion at all, has been hotly diſputed in various ſuits in the kingdom of Ireland ſince the year 1793, the inſtance court of admiralty there (the judge in that kingdom having no prize commiſſion) pretending to juriſdiction in ſuch caſes, and applications being in conſequence made to the courts of law for writs of prohibition, not without argument that the courts of law themſelves were the proper

(16) See Lord Kenyon's opinion, 3 Term. Rep. 341.

(17) The claim of freight is liable to many exceptions which cannot be diſcuſſed without the prize queſtion.

(18) Whether in ſuch caſe there has been a ſham ſentence of condemnation by an unauthorized court, or no form of ſentence of condemnation whatſoever, doth not affect the queſtion above.

(19) See Douglas, 590.

juriſdiction. I think there can be no doubt that ſuch a queſtion, at leaſt as an incident, belongs ſolely to the court of prize. The defence muſt always involve the queſtion of prize. It is impoſſible to ſeparate the two queſtions. No metaphyſical ſubtility can do it, by ſaying that the ſale on land was not one continued, but a ſevered act, or in any other way; the queſtion muſt ſtill revert, was it lawful prize or not. The queſtion is—is the property changed or diveſted out of the original owner? and this was ſo, if lawful and complete prize are identified and the ſame; and the taking *as prize* veſts the juriſdiction of the prize court, though the capture ſhould afterwards turn out to be illegal or incomplete (20). Lord Mansfield has expreſsly ſaid, that the taking a ſhip upon the high ſea, not as prize, is triable at law to repair the plaintiff in damages; but the taking upon the high ſea, as prize, is not triable at law; and in fact, in England there never was a doubt about it (21).

(20) Douglas, 593.

(21) See the caſes of the Flad Oyen, Robinſon's Admiralty Reports, 1 vol. and of the Perſeverance, Pitter, ſame work, 2 vol. In the firſt there was a re-capture; in the latter none. See alſo the caſe of the Kierlighett, 3 Robinſon's Reports, deciſive that ſuch are caſes only for the admiralty prize court. Where the admiralty decide that a ſhip is no prize, they may entertain a new libel againſt the captors, to make them account to the captured. 4 Term. Rep. 585.

It was an extraordinary argument urged in this caſe, that re-capture is neceſſary to found the juriſdiction of the prize court, and that the ſentence of a foreign court of admiralty, in an enemy's country, can never be by us regarded. Is not the ſentence of ſuch a foreign court of admiralty, every day in inſurance caſes, ruled to be concluſive as to all matters within its juriſdiction, and contained in its ſentence? Douglas, 559, and are not ſales (of veſſels captured from us) to neutrals, under the ſentences of the courts of admiralty of France, held valid? 3 Robinſon's Rep. 96. The French captor certainly cannot ſet up ſuch a ſentence againſt the firſt owner, but a neutral purchaſer may.

One more queſtion will ſuffice, that in Lord Camden *v.* Home (22); in that caſe, the nature of which ſhall be more particularly mentioned preſently, a matter aroſe *incidentally*, viz. the conſtruction of an act of parliament in order to found their opinion on the principal queſtion. It was admitted that the principal queſtion was within the juriſdiction of the prize court, nor was it denied that it had of courſe cognizance of all incidental matters ariſing neceſſarily therefrom; but it was argued, that if this court decided ſuch incidental matters differently from the common law courts, it was ground for prohibition; but the argument was over ruled, and the contrary doctrine eſtabliſhed.

(22) 4 Term. Rep. p. 390, &c.

It has been already ſaid, that the courts of law, ſenſible of their inability to try the matter of prize, never have attempted to reſtrain the juriſdiction of the admiralty prize court to the land, or to control it by the principle of locality. It is almoſt to repeat the ſame thing in different words, when we add that they never have entertained any jealouſy of this court; that the reſtrictive ſtatutes of Richard do not apply to it; and that prohibitions to this court are unknown. Each of theſe poſitions, however, may require illuſtration in terms ſomewhat more particular, and have received it from Lord Mansfield in Lindo *v.* Rodney, whoſe obſervations ſhall here be repeated, or the ſubſtance of them.

And firſt, the juriſdiction of the prize court is not confined to the ſea; and in the very caſe juſt mentioned, it was determined to extend to a capture made *at land* by the aſſiſtance of a fleet, or in conſequence of a ſurrender to ſhips at ſea, the prize juriſdiction depending not on locality, but on the ſubject matter, which is governed by the jus belli, and not by the rules of the common law. The incompetence of the courts of law to embrace adequately ſuch queſtions from their very nature, and the fitneſs and adequacy of the prize court to decide them, has been already dwelt upon. The competency of the prize court to follow them on land, appears from the following conſiderations. Firſt, from the general words of the commiſſion, and the reaſon of the thing

which requires that the words ſhould be general, becauſe there never was a ſingle ſhip, much leſs a fleet, which has failed to make repriſals againſt an enemy, which had it not in view to act on ſhore, if occaſion ſhould offer, nor can it be otherwiſe. The words of the prize commiſſion therefore are general.—*All manner of captures, ſeizures, prizes, and repriſals of all ſhips and goods*, it doth *not* ſay, *upon the ſea*; it doth *not* ſay, *goods in the ſhip*; it uſes the word *repriſals;* the moſt general word that can be uſed; and it doth not make it neceſſary in the libel to ſay that the cauſe of action aroſe upon the ſea.

Secondly, If the juriſdiction of the prize court did not extend to the land, miſerable would be the condition of the captors, miſchievous it would be to the fair claimant, and ſtill more miſchievous to the ſtate. The prize thus made on land, could not be condemned; if granted, it could not be ſhared (23). *Every officer and ſailor would be liable to actions without number* (24). The taking could not be diſputed. They could only have *witneſſes from abroad who could not be compelled to come.* The grounds upon which the prize

(23) For the prize court decrees diſtribution to be made according to his majeſty's inſtructions.

(24) The paſſages in italics are ſo diſtinguiſhed to mark how entirely Lord Mansfield agreed with Sir L. Jenkins, ſupra, as to the advantages of the admiralty court, while they, at the ſame time, in a very clear manner, point out to the reader wherein thoſe advantages conſiſt.

court condemns or acquits, could not be read at law, and in every action where the plaintiff recovered to the value of a farthing, the captor muſt pay the coſts; thus colourable claimants would eaſily ruin the captors through their want of the means of defence.

It would be equally miſchievous to fair claimants. They could not have their property reſtored inſtantly on their own papers, books, and affidavits. They muſt make formal proof; and the owners or crew of a privateer all the while might be ſpending the effects.

To the State, the conſequences would be ſtill more miſchievous. No diſtinction can be made between Britiſh and Neutrals; if the juriſdiction be over-ruled in one caſe, it is in the other.

By the law of nations and treaties, every nation is anſwerable to the other for all injuries done by ſea or land, or in freſh waters, or in any port. Mutual convenience, eternal principles of juſtice, wiſe policy, and the conſent of nations, have eſtabliſhed a ſyſtem of procedure, a code of law, and a court for the trial of prize. *Every country ſues in thoſe courts of the others, which are all governed by one and the ſame law, equally known to each.* The claimant is not obliged to ſue the captors for damages, and undergo *all the delay and vexation* to which he may think himſelf liable, if he ſues by a form of litigation of which he is totally ignorant, and ſub-

jects his property to the rules and authority of a municipal law by which he is not bound.

His lordſhip then proceeds to obſerve, that every reaſon which created a prize court, as to things taken at ſea, extends equally to things taken on land.

The inſtance court is not allowed to take cognizance of matters ariſing in *ports*, *havens*, or rivers, within the body of a county. But the prize court has uniformly, without objection, tried all captures, though within *ports*, *havens*, &c. in this realm. *The nature of the ground of the action (prize or no prize) not only authorizes the prize court, but excludes the common law.*

The conſequence of the doctrine above given is, that the courts of common law, in all their altercations with the admiralty, never ſhewed any jealouſy, or made any complaint of that part of the juriſdiction which related to prize, never attempted to control it, and never have granted a prohibition (25) to that ſide of the court: and it is acknowledged that the famous ſtatutes of Richard II. and Henry IV. relate only to alleged uſurpations of the inſtance court, in cauſes *civil* and *marine*; to contracts, pleas, and quereles, which were declared to be only triable at law, and that there is not a word in any of

(25) See prohibitions refuſed in Brown *v.* Franklin. Carthew, 474; and in Hubbard *v.* Pearce, quoted Douglas, 597; and in Lord Camden *v.* Home, 4 Term Reports.

thoſe ſtatutes applicable to the prize court, nor a ſyllable about commiſſions to judge of prize.

Laſtly, the legiſlature in ſeveral acts of parliament, uſually called the prize acts, has recognized and referred to the juriſdiction of this court over goods taken on land *as prize*; for inſtance, the prize acts of the 17th and 29th of Geo. II. contain a clauſe that the lords of the admiralty ſhall grant a commiſſion, at the requeſt of the owner, to the captain of any ſhip, for attacking or taking with ſuch ſhip, or with the crew thereof, any place or fortreſs *upon the land*, or any ſhip or goods belonging to, or poſſeſſed by, &c. and the ſtatute 19 Geo. III. meaning to expreſs the ſame thing, takes the juriſdiction for clear and certain, and theſe are imitated by ſubſequent ſtatutes.

Of theſe prize acts, making part of the law of the prize court, and therefore here demanding our attention, ſeveral have been made, one at leaſt in each war during the eighteenth century; thoſe in the reign of Queen Anne being the firſt which veſted the ſole property of ſhips and goods taken (being firſt adjudged lawful prize) in the captors. The ſubſequent acts have not very materially differed in their proviſions, but as they were temporary, and intended only for the duration of the war; our preſent purpoſe only requires us to give the ſubſtance of that made

about the commencement of the preſent war, in 1793(26).

This act ordains that the officers and ſailors on board every ſhip and veſſel of war, in his majeſty's pay, ſhall have the ſole property in all captures (being firſt adjudged lawful prize in ſome of his majeſty's courts of admiralty legally authorized) to be divided in ſuch proportions and manner as his majeſty orders by proclamation.

That all captures made by the ſhips of private owners, thereto commiſſioned by the lords of the admiralty, ſhall wholly belong to the owners of ſuch ſhips and their crews, to be divided in ſuch ſhares as may be agreed upon between them.

That prizes made by the army and navy conjointly, are to be divided as his majeſty ſhall appoint; and for default of ſuch appointment, at the diſcretion of the commander of the expedition, to be afterwards ratified by his majeſty—but that the army is not to ſhare in prizes captured on the voyage.

That deſerters ſhall not ſhare, nor officers deſerting their convoy in order to chace, nor private ſhips of war with convoys, unleſs aſſiſting

(26) The prize acts are,
6 Anne, ch. 13.
9 Anne, ch. 27.
13 Geo. ch. 4.
17 Geo. II. ch. 34.
29 Geo. II. ch. 34.
19 Geo. III. ch. 67.
21 Geo. III. ch. 15.
33 Geo. III. ch. 34 & 66.
34 Geo. III. ch. 70.
37 Geo. III. ch. 109.

by order; and ſhares muſt be claimed within three years.

That prizes in the Weſt Indies, until ſentence, ſhall be under the care of the revenue, and the cargoes of all prizes are liable to duties.

That ſecurity muſt be given before letters of marque iſſue, and that they are forfeitable for ſmuggling; that they may be revoked by the lords of the admiralty, but the king in council may ſuperſede the revocation.

That ſhips captured by revenue boats belong to his Majeſty (27).

It then provides, that the condemnation of prizes ſhould be as ſpeedy as poſſible—that the judges of courts of admiralty ſhould, within five days after requeſt, finiſh the preparatory examination of the perſons commonly examined in ſuch caſes, in order to prove the capture to be lawful prize, or to enquire whether it be lawful prize or not; and that the proper monition, uſual in ſuch caſes, ſhall be iſſued and executed within three days after requeſt.

That agents for ſales of prizes taken by any of the king's ſhips, ſhall be nominated in equal numbers by the commander, the officers, and ſhip's company, or others entitled to ſuch prize; and the agents muſt exhibit their letters of attorney

(27) In the very laſt ſeſſion, an act was paſſed to empower the granting commiſſions for captures to revenue cruiſers.

in the court of admiralty within ſix months, on pain of five hundred pounds; to be regiſtered in fourteen days after, on pain of one hundred pounds, on the regiſtrar.

That bounty money ſhall be paid for taking or deſtroying the enemy's ſhips.

That the goods of Britiſh ſubjects, retaken from the enemy, ſhall be reſtored to the owners, paying for ſalvage one-eighth to ſhips of war, one-ſixth to privateers.

That claimants ſhall, within a certain number of days, generally twenty, put in their claims, and within five days after give ſufficient ſecurity to pay double coſts, if the deciſion be againſt their claim, otherwiſe the judge is to proceed to ſentence. That if further proof than the ſhip's papers and examination in preparatory be neceſſary, and delay occaſioned thereby, or by an appeal being interpoſed, the capture may be appraiſed by ſworn perſons named by the captor, an inventory taken, the goods unladen, and put into proper warehouſes under the locks of officers of the cuſtoms; and on ſecurity given for the value according to the appraiſement, in caſe the ſame be adjudged lawful prize, delivered to the claimants, or on requeſt ſold by auction, and the money lodged in the bank; and the judge may, on ſecurity, give the capture a paſs. Security for ſuch coſts as the court ſhall think proper to be paid, in caſe the alleged prize be not condemned, is alſo taken of the captors, before the interlocutory decree for

appraiſement, ſale, or reſtitution, on ſecurity to the claimants or their agents.

That if the claimants refuſe to give ſuch ſecurity, the judge may, on requeſt of the captors, cauſe the ſaid captors to give ſecurity to pay the claimants the value according to the appraiſement, in caſe ſuch capture be adjudged not lawful prize; and the judge ſhall then make an interlocutory order for the delivering the ſame, to the captors or their agents.

That no advocate or proctor ſhall be concerned in letters of marque or privateers, and that no regiſtrar ſhall act as proctor.

That all papers found on board prize veſſels ſhall be brought into the regiſtry of the admiralty forthwith, but none except neceſſary papers tranſlated.

That prize agents muſt give due notifications of payments in the Gazette.

That appeals ſhall lie to the lords commiſſioners of appeals in prize cauſes, of whom the major part preſent muſt be of the privy council (28).

The prize acts in the preſent war are, as to France, 33 Geo. III. ch. 34 and 66; as to Spain and Holland, 37 Geo. III. ch. 109; 34 Geo. III.

(28) The time within which appeals muſt be brought, or at leaſt inhibitions taken out, has been very materially altered and affected by a very late act, 38 Geo. III. ch. 38; but this will come more properly in the chapter on the practice of the prize court.

ch. 70. They are only to be in force during the war; and the king's proclamation, directing the mode of diſtribution of prize money as to France, bears date 17th of April, 1793; and as to Holland and Spain, 25th November, 1795, and 25th of January, 1797.

The proclamation, which is given in the Appendix, directs only as to king's ſhips the mode of diſtribution, leaving the crews of privateers to divide as may be agreed among themſelves and with their owners.

Beſides the property in the capture given by the prize acts, they hold out other encouragements, viz. head-money, and ſometimes gun-money. By the prize acts, in the preſent war five pounds a head is given to the captors for every perſon on board the prize.

And by 14 Geo. II. ch. 38. the widow of a volunteer ſeaman killed or drowned in the ſervice is entitled to a bounty equal to one year's amount of his pay.

Theſe prize acts being temporary and expiring with each war, it may ſeem leſs neceſſary to give the ſubſtance of them, or of the laſt, containing that of all the reſt; but it muſt be recollected, that as the variations between them are ſmall, ſo it is very certain that they will, in any future war, be revived nearly, probably exactly, in the ſame form, and ſo may be conſidered as having a certain perpetuity.

Of all theſe prize acts it has been obſerved (29), that they are of modern date, and form a very ſmall part of the law of the admiralty, and that they were drawn up principally for the direction of the vice-admiralty courts, to which a juriſdiction in queſtions of prize was thereby for the firſt time given; that though the admiralty has not a juriſdiction inconſiſtent with theſe ſtatutes, yet they are but affirmative acts, leaving every matter, not therein ſpecially provided for, as it was before.

Certain it is, that the prize acts have looked particularly to the vice-admiralty courts in the Weſt Indies, in which, from their remoteneſs and other cauſes, great delays and abuſes have happened; and, therefore, as we have ſeen, thoſe courts have been entirely new-modelled and put under new regulations by a late act, 41 Geo. III. ch. 96. and in the prize acts themſelves, their fees are limited, their delays puniſhed with pecuniary mulcts of five hundred pounds, and the king enabled to regulate them at pleaſure.

There are caſes to which theſe prize acts do not apply, as for inſtance, to a *joint* capture both by the army and navy. The prize acts were only meant to attach on captures by ſhips; and the legiſlature accordingly adapted all the proviſions of them to captures of that deſcription, without

(29) 3 Term Reports, Smart v. Wolf.

extending them to a joint capture both by army and navy (30). This, therefore, is *caſus omiſſus* in the prize acts, and doth not follow within their purview.

From hence it was attempted to ſet up the juriſdiction of the common law courts, even in matter of prize, in ſuch caſes as that juſt mentioned, and to prohibit the admiralty prize court where it was alleged to have put a wrong conſtruction on the prize acts; and this notable attempt was made in the caſe of Lord Camden v. Home, 4 Term Reports, p. 382.

The prize acts uſually give to the navy the intereſt in prizes taken by them, to be divided in ſuch proportion as the king by his proclamation ſhall direct. The Dutch prize act, 21 Geo. III. ch. 15. had done ſo. The king and council rightly thought that there might be a capture by the king's ſhips which would not come within this act; for being a grant of the king's intereſt, it ought not to be extended further than the literal import of the words: they therefore gave to the officers who were ſent on an expedition to the Cape of Good Hope (31), ſecret inſtructions (in order to prevent any conteſt concerning the diſ-

(30) Even the caſe of a joint capture by a king's ſhip and a privateer, in ſome of the prize acts, has been excepted, and the property not veſted in the captors, but remains in the king.

(31) General Meadows and Commodore Johnſtone.

tribution of the prizes to be taken at the Cape by the joint operation of the army and navy), that ſuch prizes ſhould be divided between the land and ſea forces in two ſhares, to be afterwards ſubdivided in certain proportions, this being the uſual practice, and when no ſuch inſtructions are given, the army and navy having commonly entered into an agreement, as to the ſeveral proportions which each ſhould take.

The fleet having on board land forces took a ſhip as prize. The navy inſiſted that it was a ſole capture by them, within the meaning of the prize act, and that the troops had only a right to ſhare as paſſengers. A ſuit was inſtituted, and ſentence obtained in the admiralty court, that the ſhip ſhould be condemned as lawful prize by the ſquadron. An agent was appointed for the navy, who ſold the prize ſhip and cargo, and diſtributed part of the proceeds. On an appeal, the lords commiſſioners pronounced that it was a prize by the conjoint operation of the army and navy, and the property veſted not in the captors but the king, and moniſhed the agent of the navy perſonally to account for the ſhip and cargo, and bring in the proceeds in his hands, poſſeſſion, or power.

It was contended, that the common law courts had a right to interfere by the prize act in queſtion, becauſe by their general ſuperintending juriſdiction, they have a right to conſtrue all acts of parliament, and to confine inferior juriſdictions to right conſtructions; or, in other words, that

ſince the prize acts were paſſed, the courts of common law acquired a juriſdiction over all queſtions of prize within the ſcope of thoſe acts, although no mention is made in any of them of any ſuch new juriſdiction being intended to be given.

But it was determined, that the prize courts and courts of lords commiſſioners of appeals have the ſole and exclusive juriſdiction over the queſtion of prize or no prize, and who are the captors, notwithſtanding any of the prize acts: and if they pronounce ſentence of condemnation, adjudging alſo who are the captors, the courts of common law cannot examine the juſtice or propriety of it, even though perhaps they would have put a different conſtruction on the prize acts. And the ſame courts have power to enforce their decrees. Therefore, where the lords commiſſioners had iſſued a monition after ſentence to a navy agent, employed by perſons ſuppoſed to be entitled to the prize, requiring him to bring the produce of it into court, to be diſtributed among the perſons declared to be entitled by their ſentence, this court refuſed to grant a prohibition.

It will not be irrelative here to add ſome account of the mode of payment of wages, and of prize money in the king's ſervice.

The method of payment of wages to ſailors in the king's ſervice doth not come within the verge of the prize court; but as it is connected with the matter of prize, as it is marked out by the prize

acts which we have mentioned, and as an analyſis of it will be very uſeful, I will venture to inſert it here, to ſave the trouble of a diſtinct chapter. The prize court, as we have juſt ſeen (32), doth ſo far intermeddle as to prize-money as to decree, in ſome caſes, an account and proceeds to be brought in, and diſtribution to be made according to his majeſty's inſtructions (33).

The mode of payment of wages in the king's ſervice, and of prize-money, is marked out by ſeveral acts of parliament, of which the ſubſtance ſhall be here given, particularly of that on which the later acts are a ſuperſtructure, the 31ſt Geo. II. ch. 10. and which repealed all the former acts, and that of 32 Geo. III. ch. 33 and 67; and 35 Geo. III. ch. 28.

By theſe acts, when any of the ſhips of his majeſty have been in ſea pay twelve months or more, if ſuch ſhip arrive in Great Britain, the wages of all ſuch ſhips are to be cleared off, except the laſt ſix months; and when they are laid up, all wages are to be entirely paid off within two months after the ſhip's arrival, in the port where ſhe is to be laid up.

The captain is to make out five complete pay-books immediately, and to ſend them to the commiſſioners of the navy at their board. The commiſſioners of the navy are to ſolicit a ſum of money

(32) Even as to head-money, in a late caſe.

(33) In Lord Camden v. Home.

ſufficient to pay the wages, and as ſoon as it be iſſued to them, to cauſe immediate payment to be made of all the wages due (34).

If any officer, ſeaman, or marine, was abſent on leave, when the ſhip was paid off, upon any detached ſervice; or from having been taken or caſt away, and make application for his wages in perſon, or through his commander, to the commiſſioners of the navy at their board, or to one of them reſident at any port, the ſhip's books are to be ſent where he is, and the wages paid. If ſhip not paid off, tickets given him till ſhe is.

If he be diſcharged, he gets a certificate from the commander, on producing which, and being identified by an officer of his ſhip, he gets his wages in like manner.

If taken or caſt away, he muſt enter on board a king's ſhip again in reaſonable time, unleſs he has ſufficient excuſe, otherwiſe his wages will not be paid.

If marked as running away, he can get no wages till the mark be taken off.

(34) If the ſhip arrives in any port of Great Britain where there is a commiſſioner of the navy, he ſolicits a ſum to pay the wages, and pays them. It muſt be obſerved, that ſince the mutiny at the Nore, an act was paſſed, 37 Geo. III. ch. 53. reciting an order of council, dated 3d of May, 1797, for an increaſe of pay to ſeamen and marines, enacting, that all wounded perſons ſhould receive full pay till healed or penſioned, and that the allowances of proviſions on board ſhips of war ſhould be full, without leakage or waſte.

If removed from one ſhip to another, he receives a remove ticket for the wages due, payable at any of the pay-offices in London, Portſmouth, Plymouth, or Chatham.

If diſcharged as unſerviceable (35), or ſent ſick into an hoſpital, he receives from his commander a ticket, and ſo from the hoſpital when diſcharged from thence, on which he will be paid at the pay-offices aforeſaid; or if at any other port, he will apply to the officers of the cuſtoms, who forwarding his ticket to the commiſſioners of the navy, will get from them a bill for the amount of his wages.

If he die on board, a dead ticket is tranſmitted to the commiſſioners of the navy, who are to aſſign it for payment in one month to his repreſentatives.

If officers or ſailors wiſh to tranſmit part of their wages to their relations, on application to the commiſſioners of the navy, they ſend them remittance bills, and duplicates thereof, as the caſe may be, to the treaſurer of the navy in London, clerk of the cheque at the great dock-yards, receiver-general of the land-tax, or officers of the cuſtoms, who pay accordingly.

Receivers of ſeamens wages muſt not take any fee above ſixpence in the pound, on pain of fifty

(35) If diſcharged as unſerviceable abroad, they are to be ſubſiſted by the conſuls, &c. at ninepence per diem, and ſent home as ſoon as may be, by 32 Geo. III. ch. 33.

pounds; and the *bodies* of inferior officers, ſeamen, and marines, cannot be taken for debt, unleſs contracted before they entered the navy, and exceeding twenty pounds.

No eccleſiaſtical court or proctor is to take more than the fees mentioned in theſe acts, under penalty of fifty pounds for each offence.

Any inferior officer, ſeaman, or marine, who ſhall be deſirous to execute a will, or a power of attorney, and ſhall at that time belong to any ſhip, muſt execute the ſame on board of ſuch ſhip, unleſs he ſhould be at ſick quarters.

If made on board, it muſt be atteſted by the commanding officer, and one other ſigning officer belonging to the ſhip, and muſt ſpecify the number at which the maker ſtands rated upon the ſhip's books; if at ſick quarters, it muſt be atteſted by the agent, and muſt ſpecify his number.

If he ſhall have been diſcharged the ſervice, and ſhall be within the bills of mortality of the cities of London and Weſtminſter, his will or power muſt be atteſted before the inſpector, or his aſſiſtant, at the navy pay-office in London.

If he ſhall be at Portſmouth, Plymouth, or Chatham, or within ſeven miles of either of theſe places, his power muſt be atteſted by a clerk of the treaſurer of the navy at ſuch place.

If he ſhall be at any other place in Great Britain or Ireland, his will, or power of attorney, muſt be atteſted by the miniſter and two churchwardens,

or two elders of the pariſh where he ſhall be at the time of executing the ſame.

All wills and powers of attorney made by inferior officers, ſeamen, or marines, muſt contain the full deſcription of the reſidence, profeſſion, or buſineſs of the perſon who ſhall be therein appointed attorney or executor, and alſo the name of the ſhip to which ſuch officers, ſeamen, or marines laſt belonged; and if made on board, or at ſick quarters, the number at which their names ſtood on their reſpective ſhip's books. Every letter of attorney muſt be declared in the body thereof to be revocable.

If a will has been made, the executors muſt ſend it to the inſpector of wills in London; and if the ſailor died inteſtate, the perſon claiming adminiſtration muſt ſend a note to the inſpector, ſtating the name of the deceaſed, that he has heard of his death, and the name of the ſhip. The inſpector then ſends to him two certificates, one to be ſigned by him and two inhabitants of the pariſh where he lives, certifying their knowledge of him, and belief of the fact; the other by the miniſter and churchwardens, to the character of thoſe two inhabitants. Theſe muſt be ſent to the treaſurer or paymaſter of the navy, who makes out a certificate, and gives leave to obtain probate or adminiſtration; and a commiſſion iſſues to the miniſter and churchwardens to ſwear the party, which being returned executed, a bill iſſues to

the ſame perſons mentioned above in the caſe of living ſailors, to pay the wages.

If the wages due are under ten pounds, the method of getting them is by the act ſhortened and rendered leſs expenſive.

Whoever willingly and knowingly ſhall perſonate or falſely aſſume the name or character of, or procure any others to perſonate, or falſely to aſſume the name or character of any officer, ſeaman, or other perſon entitled to wages, pay, allowances, or prize-money, for ſervice done on board of any ſhip of the royal navy, or of the executor, adminiſtrator, wife, relation, or creditor of any ſuch officer, ſeaman, or other perſon, in order to receive any wages, pay, allowances, or prize-money; or ſhall forge or counterfeit, or procure to be forged or counterfeited, any letter of attorney, or other power or authority whatſoever, in order to receive any wages, pay, allowances, or prize-money; or ſhall willingly and knowingly take a falſe oath, or procure a falſe oath to be taken, to obtain the probate of a will or letters of adminiſtration, in order to receive any wages, pay, allowance, or prize-money, ſhall be guilty of felony and ſuffer death; and whoever knowingly ſhall forge or counterfeit any certificate of diſcharge, or certificate of ſervitude, in order to entitle them to recover their own wages, or aſſiſt in ſo doing, ſhall be puniſhed as in caſes of perjury.

It is to be obſerved, that ſome of the proviſions above mentioned, particularly with reſpect to re-

mittances of pay and prize-money, have been by late acts extended to principal and commiſſioned officers of the navy, and alſo to the marine forces. See 35 Geo. III. ch. 28 and ch. 95.

By another late act, 25 Geo. III. ch. 31, the duty of the treaſurer of the navy, when he preſents memorials to the treaſury for navy ſervices, and prays that they may iſſue money to the bank of England on his account, and in many other particulars, is ſpecially regulated.

In Ireland, it is provided (36) by ſtatute, that all clauſes in Engliſh or Britiſh acts, equally concerning their ſeamen and ours, are to be executed here according to their preſent tenor, ſave ſo far as the ſame have been altered or repealed. And by a ſubſequent ſtatute (37), the remittance of the wages of ſeamen employed in the navy is facilitated; many proviſions ſimilar to thoſe in the Engliſh acts already mentioned are enacted; and ample directions given to ſeamen and their relations, and to the out-penſioners of Greenwich hoſpital, with reſpect to obtaining the ſums due to them, upon producing proper certificates to the collectors of the cuſtoms in that kingdom, whoſe revenue is reimburſed by the treaſurer of the navy in England, and theſe repayments received in the Iriſh treaſury.

(36) Iriſh ſtatute, 21 and 22 Geo. III. ch. 48.

(37) 33 Geo. III. ch. 23. Iriſh.

CHAPTER VII.

ON THE LAW OF THE PRIZE COURT.

WHEN treating of the admiralty law in general, it was obſerved, that on the ſubject of prize, little or no light can be derived from the ancient marine ordinances of Europe, they ſeldom appearing to have had this matter in contemplation, and ſcarcely affording a document on this ſubject, ſave two ſmall chapters in the *Conſolato del Mare* (1). Here then we muſt launch forth into the depths of the law of nations, which afford ſuch infinite and curious matter for reſearch, that the elementary writer may well be alarmed, who attempts to draw a chart of ſo boundleſs an ocean. To touch upon all the queſtions of prize which occur in modern war, would require immenſe volumes, and therefore I have not been able to point out for myſelf any other line, in ſo confined a treatiſe as this, but that of

(1) Lately republiſhed, in an handſome form, among the very uſeful and learned labours of Dr. Robinſon.

ſelecting certain of the moſt frequent and important queſtions relating to captures at ſea, and ſhewing the application of the law of nations to them, either purely in itſelf, or as modified by the cuſtoms, uſages, and ſtatutes of England.—A plan not diſſimilar to that of the celebrated Bynkerſhoek, who, ſeemingly deterred by the view of the ſame vaſt ocean, though with incomparably greater powers to encounter it, ſelected for conſideration only thoſe *quæſtiones publici juris* which are moſt frequently agitated.

The great queſtions therefore of prize, or connected with prize, of which I ſhall treat, are the following:

1. Of legitime war.
2. Of the immediate effects of war denounced.
3. What is liable to capture.
4. When things moveable, and particularly ſhips, become the property of the captors.
5. Of ranſom.
6. Who are the captors.
7. Of recapture and ſalvage.
8. What is a legal capture as againſt the captured; which queſtion can only ariſe as to neutrals.
9. On the rights and duties of neutrals.
10. On the principles of the armed neutrality.
11. Of the principles adopted by Britain reſpecting neutral commerce.
12. Of enemies goods found in the ſhips of friends.

13. Of the goods of friends found on board enemies ſhips.
14. Of contraband.
15. Of blockaded ports.
16. Of the right of ſearch.
17. Of the proofs of enemies property.
18. Of competent courts of prize.
19. Of repriſals.
20. Of privateers.
21. Of the rights of neutrals.

OF LEGITIMATE WAR.

Vattel requires to a legitimate or lawful war, theſe three things. 1ſt. Juſt cauſe of complaint. 2dly. Denial of ſatisfaction. 3dly. A mature determination of the government, that it is for the good of the nation. But it is not my intention here to go at large into the grounds of lawful war laid down by moraliſts, but to confine myſelf to the one queſtion, whether a declaration of war be required by the law of nations?

It has been generally ſuppoſed, that to a legitimate war, a previous proclamation, or declaration of hoſtilities, or ſending *fecial* heralds to the enemy, was neceſſary; and this opinion hath been confirmed by frequent practice, both in ancient and modern times (2).

(2) In the inſtances of our wars ſince the revolution, that of King William with France was preceded by a ſolemn declaration, 7th of May, 1689; that of Queen

But as Britain and other European States have repeatedly failed to obſerve this ceremonial, we are called on to enquire whether their honour has been affected by this omiſſion.

Grotius and Puffendorff admit, that a regular denunciation of war is not required by the law of nature; but they ſay it is by the *jus gentium* (3); and Grotius even pretends that the *jus acquirendi* is ſo peculiar to a *ſolemn* war, that it has no force in others, as e. g. in civil wars, in which points he has been fully refuted by Burlamaqui. Heineccius ſeems to favour the neceſſity of a ſolemn denunciation in his Prælections on Grotius.

Thomaſius, followed by Bynkerſhoek, doth not allow that it is more than a matter of courteſy; and to uſe their phraſe, both refer it *ad ſola officia humanitatis*. They aſk what rights of war are affected or altered by its adoption or its omiſſion; and inſiſt, that though it may be proper or adviſable, it is not neceſſary. The war may com-

Anne by the ſame, 4th of May, 1702; the Spaniſh war in 1719, by the ſame; but in that of 1739, actual hoſtilities were committed before any declaration; and ſo in 1756, when thouſands of French ſeamen in our ports were ſeized by ſurprize, and their navy thus crippled during the war. So alſo in 1778.

(3) Bynkerſhoek ſaith, that Grotius did not ſo much treat of an *univerſal jus gentium*, as of the cuſtoms and uſages of certain European nations, which do not conſtitute a *jus gentium*. Quæs. Jur. pub. Lib. 2.

mence either by an actual declaration, or by open hoſtilities, or by a demand and refuſal of juſtice; and no ſolemn proclamation can be required, except by expreſs convention between nations, which doth not exiſt.

What ſolemnities, ſaith the eminent Dutch juriſt, doth reaſon require, more than to demand, in a friendly manner, reſtitution of plunder and compenſation for injury (4)? Nay, even this friendly requiſition of juſtice is not indiſpenſably neceſſary, for what forbids us to repel force by force? It may be a proof of magnanimity to give previous warning of intended force, but it is not a duty. The Romans and Achæans did it, but Polybius eſteems it their peculiar glory. The Jews, the Macedonians, the whole of Greece, Achaia excepted, had not this uſage; nor was the legality of war, the juſtice of enjoying the fruits of victory, or the ſtrength of ſubſequent treaties, ever doubted on that account. He proceeds to give many inſtances of modern wars commenced and carried on without any formal previous denunciation. That of Guſtavus Adolphus—of the Spaniards with the Dutch, when

(4) Quæſtiones publici juris, cap. 2. Vattel inſiſts, that in an offenſive war a declaration is neceſſary, though not in a defenſive, book 3. ch. 4. Grotius ſays, that though it is not always required by the law of nature, it is by the jus gentium, to produce the effects of impunity and of lawful capture, at leaſt on one ſide. Barbeyrac denies this. Burlamaqui ſupports Grotius.

the republic was liberated—of the Engliſh and Dutch in the reign of Charles II.—of the French and Spaniards in the reign of Lewis XIV.

On a ſimilar principle it has been lately ruled (5), that actual hoſtilities are not merely to be reckoned from the date of a declaration of war. That where the ſtate and conduct of a country has been for a conſiderable time ambiguous, the character of that country, during the whole of that doubtful ſtate of affairs, is to be conſidered as hoſtile, and the property ſeized during that time to be treated as hoſtile; and that although a declaration of hoſtilities might make this difference, if followed by the uſual acts and proclamation, that it might veſt the right to the capture in the individual captors inſtead of the crown; this is a domeſtic regulation only, and makes no difference with reſpect to the admiſſion of claims made by former foreign owners.

So on the breaking out, not of war, but of that ambiguous ſituation into which the conduct of France had put other countries, when Hollaud became expoſed to French invaſion, and Dutch ſhips therefore detained in our ports (6), the declaration of hoſtilities which followed acted on thoſe ſeizures (7) with retroſpective operation.

(5) See 1 Robinſon, p. 117.

(6) See the caſe of the Gertruyda, 2 Robinſon, p. 211.

(7) This would rather infer, that a declaration acting retroſpectively, as well as in future, was neceſſary. See

I proceed to conſider the immediate effects of the war denounced either expreſsly or impliedly; not all the effects of the war, nor the whole extent of the powers of the victor, but ſuch only as come within the view and deſign of the preſent treatiſe.

Of the Immediate Effects of War Denounced.

The immediate effects to which I allude, and which here claim our notice, relate to commerce with the enemy, and to his property being in our ports at the commencement of the war.

Ex natura belli commercia inter hoſtes ceſſare, ſays Bynkerſhoek (8); and adds, quamvis nulla ſit ſpecialis commerciorum prohibitio, ipſo tamen jure belli commercia vetita ſunt; a principle recognized with us in a very late caſe (9), in which it was held, that trading with an enemy without the king's licence was illegal, and the property condemnable as prize, (excluſive of any poſitive act of parliament) and therefore illegal for a ſubject to bring, even in a neutral ſhip, goods from

the ſtate of Ruſſia with reſpect to Holland, 1 Robinſon, p. 30. where the court ſaid, Ruſſia could not be conſidered as neutral from its hoſtile acts to Holland as an auxiliary of Britain; yet it would not ſay that Ruſſia was at war with Holland, no declaration having formally announced it.

(8) Quæs. Jur. pub. cap. 7.

(9) Potts *v.* Bell, in error, 40 Geo. III.

an enemy's port purchaſed by his agent there reſident, after hoſtilities commenced, though it might not appear that they were purchaſed of an enemy.

By the law of nations, all property of the enemy found in our territories at the commencement of hoſtilities is ſeizable, and even the debts due to him are claimable by the crown; but if not claimed during the war, the right to them revives with the peace; and theſe appear to be the rules adopted by England (10).

Notice in the Gazette of preliminaries of peace having been ſigned, is ſufficient notice to all commiſſioned ſhips, without any ſpecial orders from the admiralty, according to the beſt opinions in 1783.

What is liable to Capture.

This queſtion is eaſily and ſhortly anſwered, ſince all things are liable to capture, both perſons and property (11), though to things im-

(10) See ante the chapter of Droits: and ſee the treaties between England and Denmark, and between England and Spain in 1667. Upon a declaration of war or hoſtilities, ſaith Lord Mansfield, all ſhips of the enemy in our ports are detained and confiſcated, if no agreement to the contrary, Douglas 593.

(11) See Heineccius, de nav. ob vet. mer. vec. commiſſis, ſec. 9. and every other writer on political law without exception. In the caſe of mere repriſals indeed, embaſſadors,

moveable, the word occupation is more properly applied. I leave to moraliſts the taſk of aſcertaining the boundaries of the power acquired over the captive, his lands, or his goods; powers which will ever be regulated by the feelings of the warrior, and the manners of the age; and the execution and abuſe of which the mild ſpirit of the Chriſtian religion has wonderfully ſoftened, whatever may be ſaid by the fooliſh ſcoffer. It is rather my buſineſs here to enquire, when and to whom the captured property accrues?

When *Things moveable, and particularly Ships, become the Property of the Captor.*

In the enquiry as to what is the true rule upon this ſubject, we mean only the rule to which civilized nations, attending to juſt principles, ought to adhere; for in practice there is no uniform rule upon the ſubject. All nations agree in this, that a firm and ſecure poſſeſſion is requiſite to perfect and complete a capture; but their rules of evidence reſpecting the poſſeſſion are ſo diſcordant, and lead to ſuch oppoſite concluſions, that the mere unity of principle forms no uniform rule to regulate the general practice; it is with ſome the rule of immediate poſſeſſion or occupa-

travellers, women and children, have been exempted from their effects; ſi naves & merces hoſtium ſint, utræque impune capi poſſunt; hoſti enim in hoſtem omnia licere rationi conſentaneum eſt. Heineccius, ibid.

tion;—with others, the rule of pernoctation, and twenty-four hours poſſeſſion (12);—with others, the rule of bringing *infra præſidia* (13);—while, laſtly, others add, the neceſſity of an actual ſentence of condemnation. Grotius ſays, *In mari naves & res aliæ tum demum captæ conſentur cum in navalia aut portus ferantur.*—Lib. 3. ch. b. De Jure, B. & P.

To this rule, that the prize muſt be brought *infra præſidia hoſtium*, and there legally condemned, Britain adheres, and in my humble opinion with juſtice, becauſe it is not reaſonable that the owner's property ſhould be diveſted out of him, while any chance of recovering it remains, which muſt be until it is carried *infra præſidia hoſtium;* and becauſe, without a regular condemnation, it cannot legally appear that the capture has not been made *piratice*, and from a friend inſtead of an enemy.

(12) The rule of twenty-four hours poſſeſſion is the rule of Portugal, and it has been ſo ruled in French admiralties, 1 Robinſon, p. 73. It has been indeed a very general rule throughout the continent of Europe; but now no purchaſer any where thinks himſelf ſafe without a ſentence of condemnation.

(13) The rule of infra præſidia is the rule of the Roman law. See Goſs and Withers, Burrow; ſuch at leaſt it appears to be in the Digeſts; but in the Inſtitutes it is ſaid, *ſtatim occupantium fiunt.* The preſent judge of the Engliſh admiralty has ſaid, that the rule of infra præſidia is probably the true rule, 1 Robinſon, 60; and Bynkerſhoek ſays, when the former owner has loſt all hope of recovery, quod eodem redit.

That this is the rule adopted by Britain, has been recognized by Lord Mansfield, who has obſerved, that though ſome writers have held that *quæ ab hoſtibus capiuntur ſtatim capientium fiunt*; while others have ſaid, from the Roman law, that the prize muſt be brought infra præſidia; and Grotius and many more have made twenty-four hours quiet poſſeſſion the criterion; the Engliſh court of admiralty holds, that no property veſts in the captor till ſentence of condemnation as good and lawful prize (14).

It has been ſaid by Albericus Gentilis, and repeated after him by Grotius, that England formerly adopted a different rule, that of twenty-four hours poſſeſſion; and it has been alleged, that the rule now adopted by England is peculiar to herſelf. Both theſe poſitions are untrue. Sir Lionel Jenkins ſays (15), condemnation upon the enemy's poſſeſſion for twenty-four hours, is a modern practice, not agreeable to the equity and gallantry of the old Imperial law; not the law of Spain, nor of France, though ordinances have been made there to that purpoſe, but not

(14) 2 Burrow, 683, in Goſs and Withers. Lord Mansfield's words as to Grotius are, the writers whom Grotius follows, and many more who follow him, make twenty-four hours the criterion. Lord M. ſeems here in error, for Grotius doth not; but the bringing infra præſidia is his criterion, though he ſpeaks of twenty-four hours as a *jus recentius*.

(15) 2d vol. 771.

ratified by any of their parliaments, and condemned by the uſurpers in 1649; but whether they intended this as a novelty, or as an affirmance of the ancient cuſtom of England, he doth not take upon himſelf to determine. As to the rule adopted by England, it agrees with the general practice of the law of nations, by which a ſentence of condemnation is now deemed generally neceſſary, and a neutral purchaſer in Europe, during war, always looks to the legal ſentence of condemnation (16), as one of the title deeds of the ſhip, if he buys a prize veſſel.

Bringing infra præſidia hoſtium, and a ſen-
[497] tence of condemnation being neceſſary by our rule to the perfection of a capture, it will be aſked, what court has the power to paſs ſuch ſentence, and what is ſignified by bringing infra præſidia; for being in poſſeſſion of the enemy for twenty-four hours, has by ſome been conſidered as being infra præſidia? To the laſt queſtion we anſwer, that by infra præſidia is with us meant, ſome port of the enemy where ſhe may be legally condemned without any riſk of recapture before ſuch condemnation (17). Being

(16) 1 Robinſon, p. 139. Non prius fiſco acquiruntur capta, quam ſententia lata ſit. Hein. de nav. ob. vet. mer. vec. comm. ſec. 16. Old Jenkins, in his Five Centuries, caſe 224, ſays, that twenty-four hours was the rule of England.

(17) This certainly muſt be the meaning of Grotius, and of Sir W. Scott, when they ſay, that bringing infra præſidia is the true rule.

therefore amidſt the enemies fleet, or even brought into a neutral port, is not being infra præſidia, for ſtill there remains to the captured a chance of being retaken before the veſſel arrives in the enemies country, and while there remains any poſſibility of recapture to a veſſel yet uncondemned, ſhe is not infra præſidia in the eyes of Britain.

The court condemning muſt be a court acting and exerciſing its functions in the belligerent country. If the court of admiralty of a neutral country aſſumed ſuch a power, it would amount to a declaration of war. The coaſts of that country could not be ſafely approached, it would be giving the enemy a new ſtation of war, making the adjacent ſea a ſcene of hoſtilities, and affording to him moſt unjuſtifiable aid (18). If, indeed, the veſſel captured from us be coming into the port of the enemy's ally, ſhe is as in his own port (19); and where other nations adopt a different rule, as to the time or requiſites to a complete prize, Britain is ſometimes forced in queſtions ariſing relative to their then claims or in-

(18) This was determined in the remarkable caſe of the Flad Oyen, in 1ſt Robinſon's Reports, and in Havelock and Rockwood, Term Reports, 39 Geo. III. and this invalid condemnation never can be aided by any ſubſequent ſentence of a court of prize in the enemies country, pretending to confirm it, ſo as to affect the original owner; for which ſee the Kierlighett, 3 vol. 96.

(19) Bynkerſhoek, Q. J. P. cap. 5. and ſee the caſe of the Chriſtopher, 2d Robinſon.

tereſts, to adopt a rule of neceſſity, as ſhall be inſtanced and explained hereafter, under the head of ſalvage.

So far from a neutral power having a right to condemn, it has been held anciently, that it is bound to reſtore, to arreſt the alleged prize, and give it back to the captured, who have a jus poſtliminii; and we find in Sir Leoline Jenkins's letters, that this queſtion is ſeriouſly put to him by the crown, though by him anſwered in the negative. And we know that treaties between England and Portugal have engaged, that if a ſhip belonging to one country ſhould be brought by its enemy into the ports of the other, then happening to be at peace, the neutral country ſhall be bound to ſeize that ſhip, and reſtore it to its ally. And certainly it is acknowledged, that if the veſſel was taken in the neutral port, it ought to be reſtored, but not ſo by the law of nations if it be captured at ſea, and merely brought in there (20).

It has been ſaid that Britain, while ſhe inſiſts on this forbearance from condemnation of her ſhips in neutral ports, has availed herſelf of ſuch condemnations of her enemies veſſels at Liſbon and Leghorn; it is anſwered, that the validity of theſe condemnations has never been tried or decided; and beſides, theſe ports, by ſpecial trea-

(20) Si captæ naves portum gentis amicæ adire cogantur nullum jus poſtliminii. Amica gens factum pro jure accipere debet. Hein. de nav. ob. vet. mer. vec. comm. ſec. 9.

ties, had aſſumed particular characters, and came to be conſidered quaſi Britiſh ports: and the Britiſh court of admiralty has refuſed to condemn a veſſel lying in a neutral port (21).

The innovating French, of late years, attempted to go beyond any, either theory or practice, ever before heard of, by endeavouring to eſtabliſh, by means of their conſuls in foreign ports, courts of admiralty of their own in neutral countries. This attempt the American States, at an early period of the preſent war, ſpiritedly defeated; but it was more ſucceſsful in the territories of the king of Denmark, ſuch conſulate courts having been erected at Bergen and Chriſtianſand, in Norway, and moſt actively employed until the purchaſers under their ſentences were taught by the wiſe deciſions of the Britiſh court of admiralty, that thoſe ſentences were futile, invalid, and abſurd.

What has been ſaid doth not extend to ſhips carried into the ports of an ally in the war, and there condemned, or while the ſhip is there, condemned in the captor's country; and therefore, in the preſent war, a ſentence of condemnation at Bayonne, of a ſhip taken by the French and carried into St. Sebaſtian (22), and lying there at the time of the ſentence, had been held valid;

(21) In the caſe of the Herſtelder, 1 Robinſon, 119.

(22) 2 Robinſon, p. 209, caſe of the Chriſtopher.

and this deciſion agrees with Bynkerſhoek's opinion. Qu. Jur. Pub. cap. 4.

Having ſtated the rule of Britain, it will not be amiſs to mention the opinions of ſome of the moſt celebrated writers on this ſubject. Bynkerſhoek rightly diſtinguiſhes here between friends, confederates, and allies, between thoſe who are ſtrictly neutral and ſimply friends equally to both parties at war, without the additional bond of treaties, thoſe who are united by treaties to one or both of the parties, and thoſe who are allies in the war: of the laſt there can be no queſtion that they are bound to reſtore the captured property of their allies brought into their ports: of the firſt, that they are not, for to take from one friend to give to another, only in equal degree of amity, is evidently an injury to the former; as to federates, he admits that their treaties may bind them to ſuch a reſtoration (23); but ſeems to hint, that he cannot well conceive how this can be done without ſometime more than *damnum*, without *injury* to the party from whom his prey is taken, and to the State to which he belongs.

The other part of the queſtion he deems of more difficulty, but reſolves, that by the law of nations, the enemy may ſell captured property in

(23) He mentions a treaty between the States General and Portugal, ſimilar to that above ſtated between Portugal and England.

a neutral country, and the neutral permit it, the property of the former being free in ſuch a country, and the latter being at liberty to aſſiſt our enemies, being neutral to them, ſo that it be not with warlike apparatus, nor the aſſiſtance extended to one more than the other; and thinks that any pact to the contrary, ſuch as that between Holland and England, in 1662, is a ſpecial pact, and an exception (24).

Vattell ſupports him (25); a privateer, ſays he, may carry his prize into a neutral port and ſell it, though he would not be allowed to put his priſoners on ſhore in order to confine them.

Both authors evidently ſuppoſe that the property is already completely veſted in the enemy, without ſaying a word of condemnation, the very ſuppoſition which England diſallows.

To make a perfect and legal prize, it is alſo neceſſary that it ſhould not be made in any neutral port or country, nor even within ſhot of the cannon of a neutral fortreſs.

The capture may be made either by king's ſhips, by privateers armed with letters of marque or commiſſions, by merchantmen furniſhed with letters of marque, or by veſſels altogether uncommiſſioned; but all theſe latter ſpecies of capturing, with their reſpective rights and powers, ſhall be conſidered in a diſtinct chapter.

At preſent the queſtion before us is, *when* a capture becomes complete? to which the anſwer

(24) Quæs. juris publici, cap. 15. (25) Book 3.

made by Britain appears to be, when it is paſt all hopes of recovery, carried infra præſidia, and there condemned by a court legally authorized.

Such a court muſt, in determining that a capture is legal, be governed by certain principles, to unfold which this might ſeem the proper occaſion; but as they lead us into the vaſt and extenſive field of the duties and rights of neutrals, I have thought it more expedient to poſtpone that queſtion; and, ſuppoſing for the preſent the capture to be legal and complete, to conſider the power of ranſoming the capture thus legally made, who are the captors that might thus claim a power of ranſoming, and what is the law of recaptures.

Of Ranſom.

The cuſtom of ranſoming appears, from ſome regulations in the *Conſolato del Mare*, to have been anciently practiſed. It then fell into diſuſe, and ſeems to have been revived in the ſeventeenth century: but the frauds which reſulted therefrom, and the advantages thereby loſt in weakening the enemy, have induced many maritime powers, and particularly France, and not long ſince Spain, to prohibit the offering and accepting ſuch ranſoms, and England has adopted the like prohibition.

By the 22d Geo. III. ch. 25, it is enacted, that it ſhall not be lawful for any ſubjects to ranſom, or to enter into any contract for ranſoming, any ſhip

belonging to any Britiſh ſubjects, or any goods on board the ſame, which ſhall be captured by the ſubjects of any ſtate at war with his majeſty, or by any perſons committing hoſtilities againſt his ſubjects—

All contracts which ſhall be entered into, and all bills, notes, and other ſecurities, which ſhall be given by any perſon for ranſom of any ſuch ſhip, or of any goods on board the ſame, ſhall be abſolutely void—

If any perſon ſhall ranſom, or enter into contract for ranſoming, any ſuch ſhip, or any goods on board the ſame, ſuch perſon ſhall forfeit five hundred pounds; to be recovered, with full coſts, by any perſon who ſhall ſue by action of debt in any court of record in Weſtminſter.

In Ireland a ſimilar ſtatute was paſſed in the 21ſt and 22d years of his preſent majeſty's reign, chapter the 54th.

Before theſe ſtatutes were made, it was held that the maſter might hypothecate the ſhip for his own redemption; and very curious queſtions aroſe, occaſioning violent ſtruggles between apparent humanity and apparent juſtice, for theſe qualities never can really come into contact, of which remarkable inſtances may be ſeen in Yates *v.* Hall, 1 Term Rep.; and in Briggs *v.* the Perſeverance, Appendix to the preſent work.

By the prize act, a privateer taking ranſom forfeits her commiſſion or letters of marque, and her

commander is punishable with fine and imprisonment by the court of admiralty.

Who are the Captors.

Upon this subject, before the days of Grotius, much controversy had arisen. The modern interpreters of the Roman law finding therein the adage *capta capientium fieri*, held that primarily the immediate takers acquired a property in the capture, though the distribution was left to the discretion of their commander. This opinion Grotius labours to refute; though he admits, that states may, as they please, reserve the property to themselves, or give it to the captors: yet he insists that they have universally agreed, that such captured goods shall be considered in no other light than *res nullius*, which become the property, not always of the immediate occupants, but of those under whose power they are, or by whom they are paid or employed.

Even if enemies goods do become, by the law of nations, the property of him that takes them, yet the present practice of the most civil and puissant sovereignties of the world hath superseded this law; and the title to enemy's goods is vested in the prince, or governing power, and from thence derived as other *regalia* are (26).

(26) Quum Princeps sit, cujus auspiciis bellum geritur, idemque et sumtus et onera ferat, præda ipsi cedit.—Hein. De Nav. ob. vet. mer. vec. commissis. sec. 13.

One caſe is ſaid to be excepted, that of a merchant ſhip, without commiſſion, taking a ſhip which firſt aſſaults it. Bynkerſhoek holds that this capture belongs to the victorious crew, excluſive of every other claim; and it is ſaid that the ſovereign has no effective title, as the mariners acted under the primæval law of ſelf-defence, paramount to all civil rights and conſtitutions, and needing no commiſſion. This reaſoning may be good as to pirates; but I ſee nothing to except the caſe from the general rule of captures, if it be from a legal enemy. However, this caſe is provided for by ſtatute, dividing the ſpoil between the crew of the ſhip and the owners in the manner practiſed in private ſhips of war (27).

The right of the ſovereign to all captures was acknowledged in France before the revolution; was always the law of England, according to the opinion of the privy-council declared a few years after the reſtoration (28); and, in Vattel's judgment, ought to be the law of all nations (29). The law of nations diveſts the right of the former owner, and then the municipal law veſts it in the king (30). Conformably to Vattel's reaſoning, indeed, this right or prerogative in the king ought to be con-

(27) Statute 22d and 23d Charles II. ch. 11.

(28) Sir L. Jenkins.

(29) Vattel, book [illegible]. ſec. 202.

(30) By the king or prince I always underſtand the governing power of the ſtate, whatever its form may be.

ſidered as a truſt for the benefit of the nation. And ſuch ſeem to have been the ſentiments of the monarchs and parliaments of theſe countries in the eighteenth century; for the legiſlature of Britain has generally, during that period, taken upon itſelf to grant to captors as their own property (31), after legal ſentence of condemnation, all prizes made by king's ſhips, or privateers and letters of marque, but to be divided and apportioned, in the firſt caſe, in ſuch ſhares and manner as his majeſty by his royal proclamation (32) ſhould appoint, which proclamation iſſues accordingly; and in the latter, in ſuch manner as ſhall be agreed upon among the parties.

The captors entitled under theſe acts and proclamations are not only thoſe immediately engaged, but all veſſels of the ſame or an allied nation near enough to ſtrike terror into the enemy (33).

Caſes of *joint capture* are, however, attended with much difficulty, as depending often on minute facts, and the deciſions upon them have not been always uniform. Perſons who do not actually take poſſeſſion, but only contribute endeavours to that event, are captors not de facto, but

(31) See the prize acts.

(32) This proclamation in the preſent war, as to France, is dated 17th April, 1793.

(33) Molloy, book 1. ch. 2. ſec. 22. 2 Leon. 182. 2 Robinſon, p. 28. Douglas, 324. Sir L. Jenkins.

by conſtruction, and the diſpoſition of the court of admiralty is to narrow that conſtruction. Thus in the caſe of the Mars, in 1760, quoted 2 Robinſon, p. 22, a claim of joint capture was diſallowed to ſhips not in company, but ſtationed at different outlets to catch the enemy. And the Veſtal, detached from a part of the fleet on the coaſt of Holland, in 1798, to call in aid the whole body of the fleet, and give information to the admiralty, and thereby prevented from joining till two days after the engagement with De Winter, was not permitted to ſhare. 2 Robinſon, p. 16. The *onus probandi* lies on thoſe ſetting up the conſtruction; but joint chaſing, or being in ſight, is ſufficient to entitle ſhips on captures at ſea, provided the being in ſight be at the commencement of the engagement, or afterwards during its continuance; in either of which caſes, being detached on ſervice during part of the time, ſhall not prejudice. Without theſe requiſites, *common enterprize* is *not* ſufficient. We ſpeak of ſhips; for mere being in ſight of a battle at ſea, without a contribution of *actual* aſſiſtance, is not ſufficient to ſupport a claim of an army to ſhare with ſea forces (34). Claims on the part of *non-commiſſioned* joint captors have been admitted; but in a late caſe it was ruled, that private armed ſhips, ſuch as tranſports, interpoſing in a ſervice, if not aſſociated

(34) See a claim of the army to ſhare in the ſhips captured at Saldanha bay refuſed, 2 Robinſon, 55.

and employed in a military capacity, were not entitled, and wearing a pennant no concluſive proof thereof (35).

Grotius diſtinguiſhes between acts of hoſtility truly public, and private acts that are done upon occaſion of a public war. By the latter, according to him, perſons acquire to themſelves, principally and directly, what they take from the enemy—whereas, by the former, every thing taken belongs to the whole body of the people, or to the ſovereign. This diſtinction Burlamaqui juſtly condemns; for the war being derived from public authority, whatever right individuals have to things taken from the enemy muſt be derived from thence alſo. The right of war is in the ſovereign alone, and all things taken are originally acquired to him, in whoſe hands ſoever; and therefore England conſiders prizes, whether taken by letters of marque or king's ſhips, equally belonging to the ſtate, till granted to the captors.

Of Recapture and Salvage.

To underſtand this ſubject, it is previouſly neceſſary rightly to comprehend the notion of the *Jus Poſtliminii*. The Roman definition of it was given when treating of the civil law (36). I ſhall

(35) 2 Robinſon, 274.

(36) See ante the chapter on the relation between father and ſon.

here give Vattel's, which is, *that right in virtue* of which things taken by the enemy are reſtored to their former ſtate, when coming again under the power of the nation to which they belonged.

This right is the ſubject of a remarkable chapter in the 49th book of the Pandects, entitled *De Captivis, et De Poſtliminio.* The doctrine there laid down differs from that of modern times; for the Romans conſidered this right as extending not only to perſons and lands, which do not at preſent claim our attention, but alſo to certain moveables (37), as to ſhips of war and merchantmen, though not to fiſhing or pleaſure-boats (38).

In the practice of the modern law of nations, however, all moveables or booty are excepted from the right of poſtliminium, not but that by nature goods of all kinds are recoverable by this right; but from the difficulty of knowing moveables again, and the endleſs diſputes which would ſpring from the re-vindication of them, this exception has ariſen; and alſo becauſe when ſuch effects are taken by an enemy, and carried into a place of ſafety, the owner, from the little hopes of recovering them, is ſuppoſed to have relinquiſhed and given them up. If, therefore, they are retaken *immediately*

(37) With theſe exceptions their rule was like ours. Si quid bello captum eſt, in præda eſt, non poſtliminio redit. Labeo. in cap. ff. De Captivis & Poſtliminio.

(38) Navibus longis atque onerariis, poſtliminium eſt, non piſcatoriis, aut voluptatis cauſa, ff. 49. 15. 2.

after the ſeizure, Vattel (39) ſays that the right of poſtliminium doth apply (40), becauſe then it is neither difficult to know them again, nor can the proprietor be ſuppoſed to have relinquiſhed.

The opinion of Vattel doth not differ from that of Bynkerſhoek. "If," ſaith the latter, "the "moveable is become the property of the enemy "pleno jure (41), and is afterwards retaken, it "belongs to the retaker; if not, it returns to its "former owner, he paying ſalvage (42). And no "length of time ſince the capture, nor bringing of "the prize into a neutral port, makes it a perfect "prize; it muſt, ſay the foreign juriſts, be brought "into a port of the enemy, or of one of his allies "in the war, and there, ſay Britain and moſt Eu-"ropean nations, regularly condemned."

This then has been conſidered in modern times as the univerſal rule of the law of nations, that moveables recaptured are to be reſtored to the firſt proprietor on ſalvage, unleſs the captor has be-

(39) Book 3. ch. 14. ſec. 209.

(40) Vattel is here incorrect: they go back to the owner, becauſe never perfect and complete prize. Poſtliminy cannot apply to incomplete prize. "Suavis hic ſermo de "poſtliminio," ſays Bynkerſhoek, "nam qui ſciunt quod "poſtliminium ſit, ſciunt quoque, non eſſe niſi ejus, quod "in hoſtium dominium ante tranſierat."

(41) When it doth ſo has been already conſidered.

(42) Bynkerſhoek on the queſtion, Res mobiles, & præ-ſertim naves, an & quouſque recuperatori cedant?

come full proprietor of the prize; and this rule *ſuppoſes* that the captor may become full proprietor of the prize, to the total extinction of the rights of the firſt proprietor. Now of the truth of this ſuppoſition many eminent authors have expreſſed their doubts (43), and one, who I believe is ſtill living (44), decidedly denies it. He holds, that by the law of nations, though the proprietor cannot conſider the taking away of his property by a legal enemy, or even the alienation of it to a third perſon (45), as an infraction of the law of nations, yet he never can loſe his property therein; and that during the whole courſe of the war, he may, if he can, not only recover it from the enemy, which no one denies, but claim it from the hands of a third poſſeſſor; and this, whether that third poſſeſſor, being a foreigner, has obtained it by purchaſe, or being a compatriote by recapture, the firſt owner paying ſalvage to every recaptor.

(43) Puffendorf, Cocceius, Lyſerus.

(44) Mr. Martens.

(45) The words of Mr. Martens here appear a little confuſed. He ſeems to admit a poſſeſſory right in the captor, though not a right of property. Now if he had a poſſeſſory right, he might cede that to the neutral vendee, who would then have a poſſeſſory defence, which he ſurely has not, unleſs where nations, like Britain, allow neutrals to purchaſe captured property legally condemned.

Whatever be the juſt principle in the abſtract, upon this queſtion whether a full property has been conveyed to the enemy by the capture; a queſtion which never can (as Lord Mansfield has obſerved (46), ariſe but between the owner and a neutral purchaſer, or between the owner and a recaptor); Britain has left no room for controverſy on the ſubject, having repeatedly by her ſtatutes ordained, that all recaptures, unleſs the veſſel retaken has been ſet forth by the enemy as a ſhip of war, ſhall be reſtored on ſalvage; and that neutrals may legally purchaſe from the enemy, after a regular condemnation in the enemy's country, a liberty to neutrals which France denies.

Yet even here a queſtion may ariſe of ſome importance. When Britain ſays, in its prize acts, (each intended to continue only during the exiſting war), that the captured property of her king's ſubjects ſhall be reſtored on ſalvage, doth ſhe mean merely to declare the law of nations as at preſent interpreted, or by the enaction of a new law, to imply its deviation from that generally received? If the latter, then in the outſet of a war, before a prize act paſſed, reſtitution might be by captors refuſed.

The ſtatute reſtoring on ſalvage which demands our immediate conſideration at the preſent period,

(46) 2 Burrow, 693.

is that of the 33 Geo. III. ch. 66. which enacts, that if any ſhip or veſſel, or boat, taken as prize, or any goods therein, ſhall appear and be proved in any court of admiralty, having a right to take cognizance thereof, to have belonged to any of his majeſty's ſubjects of Great Britain or Ireland, or any of the dominions and territories remaining and continuing under his Majeſty's protection and obedience, which were before taken or ſurprized by any of his majeſty's enemies, and at any time afterwards again ſurprized and retaken by any of his majeſty's ſhips of war, or any privateer or other ſhip, veſſel, or boat, under his majeſty's protection and obedience, that then ſuch ſhips, veſſels, boats, and goods, and every ſuch part and parts thereof as aforeſaid, formerly belonging to ſuch his majeſty's ſubjects, ſhall in all caſes (ſave in ſuch as are thereafter excepted) be adjudged to be reſtored, and ſhall be, by decree of the ſaid court of admiralty, accordingly reſtored to ſuch former owner, or owners or proprietors, he or they paying for and in lieu of ſalvage (if retaken by any of his majeſty's ſhips) one-eighth part of the true value of the ſhips, veſſels, boats, and goods reſpectively ſo to be reſtored; which ſaid ſalvage of one-eighth ſhall be anſwered and paid to the flag-officers, captains, officers, ſeamen, marines, and ſoldiers, in his majeſty's ſaid ſhip or ſhips of war, to be divided in ſuch a manner as before in this act is directed touching the ſhares of prizes belonging to the flag-

officers, captains, officers, ſeamen, marines, and ſoldiers, where prizes are taken by any of his majeſty's ſhips of war; and if retaken by any privateer, or other ſhip, veſſel, or boat, one-ſixth part of the true value of the ſaid ſhips, veſſels, boats, and goods, all which payments to be made to the owner or owners, officers and ſeamen, of ſuch privateer, or other ſhip, veſſel, or boat, ſhall be without any deductions, and ſhall be divided in ſuch manner and proportions as ſhall have been agreed on by them as aforeſaid; and in caſe ſuch ſhip, veſſel, or goods, ſhall have been retaken by the joint operation or means of one or more of his majeſty's ſhips, and one or more private ſhip or ſhips, then the judge of the high court of admiralty, or other court, having cognizance thereof, ſhall order and adjudge ſuch ſalvage to be paid to the recaptors, by the owner or owners of ſuch retaken ſhip, veſſel, or goods, as he ſhall, under the circumſtances of the caſe, deem fit and reaſonable, which ſalvage ſo to be adjudged, ſhall be accordingly paid by the owners of ſuch retaken ſhip, veſſel, or goods, to the agent of the re-captors, in ſuch proportions as the ſaid court ſhall adjudge; but if ſuch ſhip or veſſel ſo retaken ſhall appear to have been, after the taking of his majeſty's enemies, by them ſet forth as a ſhip or veſſel of war, the ſaid ſhip or veſſel ſhall not be reſtored to the former owners or proprietors, but ſhall, in all caſes, whether retaken by any of his majeſty's ſhips, or by any privateer,

be adjudged lawful prize for the benefit of the captors.

Before the prize laws were made, continuing the jus poſtliminii for ever, unleſs the ſhip retaken ſhall have been ſet forth by the enemy as a ſhip of war, and perhaps whenever theſe laws do not exiſt, the marine laws of England ordained, and do ordain, like the old marine law of moſt other nations, that the property was changed ſo as to bar an owner in favour of a vendee or recaptor, after bringing the ſhip infra præſidia hoſtium, and a regular ſentence of condemnation there, though not before (47); and if ſo, theſe ſtatutes concur with the abſtract principle maintained by Mr. Martens. Britain alſo reſtores recaptures to friendly powers.

But though the rule above-mentioned be now adopted by Britain with reſpect to the recaptured ſhips, whoſe owners are his majeſty's ſubjects, it doth not follow that ſhe will adopt this rule as to ſhips recaptured, which had belonged to the ſubjects of foreign powers who have adopted a different rule. Here the rule of reciprocity prevails, and in whatever caſes they have ſaid that the recaptured property ſhall not be reſtored, Britain will do the ſame; and it has been laid down in

(47) A caſe before theſe ſtatutes was decided againſt a vendee, after a long poſſeſſion, two ſales and ſeveral voyages, for want of a ſentence of condemnation.

the Engliſh court of admiralty, that the proper rule for a State to apply to the recaptured property of its allies, is the rule of that country to which the recaptured property belongs (48); thus the law of Portugal, having formerly eſtabliſhed twenty-four hours poſſeſſion by the enemy to be a legal diveſtment of the property of an original owner, that rule was applied in a leading caſe (49) to a Portugueze veſſel taken by the French, and retaken by Engliſh cruiſers, after being a month in poſſeſſion of the enemy, and the Portugueze claimant defeated in favour of the Engliſh recaptor—but when Portugal, in May 1797, relaxed from that ſeverity, directed the reſtitution of the property of allies, and forbad the condemnation of Britiſh property recaptured, England adopted the ſame rule with reſpect to the recaptured property of Portugal.

The general adoption of this rule ſeems to make it unneceſſary to go into all the diſtinctions which have been made by Mr. De Martens, in a late treatiſe on the ſubject of recaptures. He holds that a recapture of moveable (50) property belonging to our allies in a war, ought to be

(48) Sir William Scott, who approves this rule, as being both liberal and juſt, obſerves, that ſtill it is not agreeable to the practice of nations, 1 Robinſon. 611.

(49) Caſe of the Santa Cruz, 1 Robinſon, p. 50.

(50) Under moveable things, the Juriſts always include ſe moventia.

reſtored according to the ſame principles as are eſtabliſhed with reſpect to our own fellow ſubjects, and ſo of the ſhips of a mere auxiliary (which he diſtinguiſhes from an ally) if they be part of the ſuccours he ſends us. That if two powers happen to be engaged in war with a third, but without any neutral concert or convention, (as the Turks and Holland were with Philip II. of Spain) neither is obliged to reſtore recaptures to the other, if the capture by the enemy was complete and perfect; and that as to perfect neutrals, if their ſhips were by the enemy legally confiſcated, and ſentence of condemnation pronounced, we are not obliged to reſtore them if recaptured; but if ſentence has not yet been pronounced, or there was no ſolid motive (51) for ſtopping them, we are bound to reſtore them, as in the laſt inſtance the enemy himſelf would be.

All theſe queſtions become unneceſſary if we have only to aſk, what would the third power have done with reſpect to our ſhips in the like caſe, and under ſimilar circumſtances.

One caſe more only remains to be mentioned, that of a recapture recovered, e. g. a French ſhip captured by A. retaken by the French, and from

(51) Mr. De Martens conceives it a difficult queſtion to determine what law is to decide on the *ſolidity of the motive* in the courts of the captors, or of the recaptors ſovereign; but concludes, that it is to be decided by neither, but by the principles of the univerſal law of nations, and by treaties.

them recaptured by B. A queſtion is here made by Mr. Martens to ariſe between the laſt recaptor and his countrymen the firſt captors; and that queſtion he makes to depend upon another, whether the firſt captor had acquired a full property in the prize, and whether that had been diveſted by the enemies recapture? If he had not acquired full property, or having done ſo it was afterwards diveſted, he cannot claim reſtitution.

It appears then, that England having adopted a moſt liberal rule of reſtitution with reſpect to the recaptured property of its own ſubjects, gives the benefit of this rule (52) to its allies (53), until *it appears* that they act towards Britiſh property on a leſs liberal principle. I ſay, unleſs this *appears*, for Britain reſtores on ſalvage without enquiry, until it appears that the ally purſues a different rule, i. e. until this information is, as it were, forced upon the court. It did ſo with reſpect to Spain, until more accurate information

(52) The preſent learned judge of the admiralty has quoted from the manuſcripts of Sir E. Simpſon, the rule in his time, which appears to be the ſame; the rule is, ſaith he, that England reſtores on ſalvage, to its allies, but if inſtances can be given of Britiſh property retaken by them and condemned, the court, in their caſes, follows their own rule. *Le n. 56*

(53) It is plain here that allies is not uſed in a ſtrict, but in a general ſenſe; not for allies in a war, but for friendly powers, States in amity.

with reſpect to the Spaniſh law compelled a change; it doth ſo with reſpect to America, Denmark, Sweden, and Hamburgh (54).

The ſalvage upon which Britain reſtores to its own ſubjects is, as we have ſeen, fixed by acts of parliament, to ſhips of war an eighth, to privateers a ſixth (55). But with reſpect to the recaptured property of allies; here ſhe again follows their own rule, and adopts a ſyſtem of reciprocity. Thus the ſalvage which Portugal decrees, being one-eighth to ſhips of war, and one-fifth to privateers, while the marine law of England reſtores, in the latter caſe, on a payment of a ſixth only, the rule of ſalvage which Portugal has eſtabliſhed, is applied to her own veſſels when reſtored in Britain (56).

We have hitherto conſidered recapture by veſſels of war; but a ſhip may be recovered alſo, or reſcued, by the inſurrection of the priſoners on board of her, or by her being forced by ſtreſs of weather, or coming by any other accident into our ports.

In theſe caſes alſo the veſſel is reſtored on ſalvage, although they not being mentioned in the

(54) 1 Robinſon, p. 65.

(55) The ſalvage to privateers was, by the old prize acts, made to depend on the time during which the prize had been in the hands of the enemy.

(56) Before the preſent war, it was not the cuſtom of Britain to grant ſalvage at all on neutral property recaptured.

prize act, and the jus poſtliminii in ſtrictneſs not applying to moveables, this ſeems rather to be an indulgence in practice, than a right. *

In the caſe of reſcue (57), we muſt diſtinguiſh whether it be of Britiſh property by Britiſh ſubjects, of foreign property by foreigners, or of foreign property by Britiſh ſeamen, or Britiſh property by foreigners. In all theſe caſes the reſcued property is reſtored on ſalvage; and in the firſt caſe, the rule adopted by the court in giving ſalvage is that of recapture; in the ſecond, the power of the Britiſh court to hold plea of the demand has been queſtioned; it has been urged, that it would not hold plea of foreign ſeamens demands of wages; but a great authority has ſaid, that ſalvage being a queſtion of the jus gentium, and materially different from that of a mariner's contract, which is the creature of the particular inſtitutions of each country, it ſaw no reaſon why ſuch a claim ſhould not be cognizable by the court; and the rule to be adopted is that of *quantum meruit*, and this has been accordingly done.

The caſes laſt mentioned are the moſt rare; but one has happened in the inſtance of Britiſh ſeamen reſcuing an American ſhip, and the court gave ſalvage at its diſcretion according to the merits; and declared, it would have given ſalvage

(57) See 2 Robinſon, p. 271. the caſe of the Two Friends.

to American ſeamen reſcuing Britiſh property, (58).

Reſcue, though meritorious, is not a duty, but a voluntary act. Attempting to reſcue, not from an enemy, but from a neutral, (from whom the owner would have a right to claim coſts and damages if the ſeizure and detention were unjuſtifiable) if the attempt be diſappointed, is a breach of the law of nations, which endangers the ſhip and cargo though otherwiſe improperly detained.

Having ſtated what the preſent practice of England is as to ſalvage and recapture, it is but matter of curioſity to remark, that before the reign of King William England appears not to have reſtored on ſalvage, where the prize had been carried infra præſidia and condemned; that an act of parliament, in 1692, firſt enacted univerſal reſtoration as a poſitive law; and that the rate of ſalvage allowed to privateers formerly, varied according to the time that the prize recaptured had been in the hands of the enemy (59), which method was firſt deviated from in the American war.

The rules of other European nations with reſpect to recapture and ſalvage (of which our adopting the rule of reciprocity, makes the know-

(58) 2 Robinſon, p. 280.

(59) See the Prize Acts in the 13th, 17th, and 29th Geo. II.

ledge neceſſary) are briefly theſe, as collected by Mr. De Martens.

Both France and Spain have ordained, that if a prize is recaptured before it has been twenty-four hours in the enemies hands, it ſhall be reſtored to the known proprietor, in conſideration of one-third for the recapture; but that after that period, it ſhall belong wholly to the recaptor.

The maritime laws of moſt other countries in Europe adopt the ſame rule of twenty-four hours poſſeſſion as conveying to the captors, at leaſt if followed by a ſentence of condemnation, a full right of property; but the laws of ſome countries, particularly of the United Provinces, enforce reſtitution after a much longer period, indeed at any indefinite time, ſtill proportioning the ſalvage to the time that the prize was in the enemies poſſeſſion, which indeed our prize acts (as we have ſeen) formerly did as to captures by privateers.

When ſpeaking of theſe regulations of the foreign naval codes, I muſt be underſtood to mean their application to recaptures of the property of the citizens of each State reſpectively, for as to neutral property they are induſtriouſly ſilent, except where conventions with particular nations have compelled explicit expreſſion.

The proviſions of theſe treaties on this head, may be found in the work of Mr. De Martens on recaptures.

What is a legal Capture?

As to the captor himſelf, ſingly conſidered, no capture is as to him legal, until it is ſo adjudged by a legal condemnation in a properly authorized court; and this court, as we have ſeen, muſt be a court of admiralty, or vice-admiralty, of the captor's country, or that of the allies in the war, and held within his ſovereign's dominions, or thoſe of his allies in the war, and not the court of a neutral power, nor any court held in neutral dominions.

The propriety of not ſuffering the captor to be judge in his own cauſe, nor to decide on the lawfulneſs of his alleged prize, is manifeſt (60). The juſtice of not referring the matter to a court in the captured's country, is almoſt equally evident.

As between the captor and captured, we have hitherto ſuppoſed every capture to be legal; though with reſpect to third perſons, many queſtions have been touched upon as to their being complete, ſo as to diveſt the property of ſuch third perſons

(60) It is therefore by the prize acts ordained, that every ſhip taken, *after* lawful adjudication as lawful prize in the court of admiralty, and *not before*, ſhall belong to, and be divided among the captors as their proper goods and chattels. And in 4 Term Reports, 385, it is ſaid, that in no inſtance can an adverſe action be maintained at law for the proceeds of prize, until the demand has been liquidated by the ſentence of a proper court of juriſdiction.

being original owners. But it is now time to inquire into the objections which may be made by the captured themſelves, or the immediate poſſeſſors of the captured property, and theſe refer almoſt intirely to neutrals, for we can ſcarcely conceive any objection made by the enemy (all whoſe property is *prima faciæ* liable to ſeizure) to the legality of a capture (61), unleſs any particular ſpecies of property has been exempted by treaty, or convention expreſs or implied, as has been ſometimes done for the barks and boats of fiſhermen (62), or by ſafe conducts granted by our own ſovereign (63). With reſpect to neutrals then the whole controverſy muſt ariſe, and this leads us to the celebrated claims of the armed

(61) The abſurd and Utopian ſcheme attempted by Hubner, Schlegel, &c. that war means military war, and commercial peace; that is, *that no private property can be the ſubject of prize*, appears to me not worthy of refutation or notice.

(62) Bynkerſhoek has a queſtion, an naves piſcatoriæ etiam contineantur legibus nauticis, 2 vol. 417. a. this privilege was allowed to the French fiſhermen in the preſent war, until it was found to be notoriouſly abuſed.

(63) Taking within cannon ſhot of neutral coaſts, or in a neutral port, was formerly conſidered as cauſe of reſtitution, Bynkerſhoek, Quæs. Jur. Pub. cap. 8. Inſult to the neutral power, and breach of the law of nations, doth not ſeem in modern practice to authorize the neutral (if he continues ſo after the inſult) to reſtore the ſhip, much leſs the enemy to claim her from the captor.

neutrality, and to the wide and extended field of the rights and duties of neutrals in general.

Of the Rights and Duties of Neutrals.

We muſt begin by defining what is meant in this diſcuſſion by the word *neutrals*. I mean then thoſe whom Bynkerſhoek calls *amici*, friends, or *non hoſtes*; and Grotius, *medii*, to diſtinguiſh them from ſocii & fœderati, allies and fœderates; and I cannot better expreſs my meaning than in Bynkerſhoek's own words.

Non hoſtes appello, qui neutrarum partium ſunt, nec ex fœdere his vel illis quicquam debent: ſi quid debeant, fœderati ſunt, non ſimpliciter amici (64).

In truth, it is obviouſly impoſſible in a general or abſtract treatiſe, to diſcuſs the rights and duties of fœderates depending on particular treaties, which muſt be as various as the proviſions in thoſe innumerable treaties, which form the expreſs or written conventional law of the ſtates of modern Europe. In laying down general principles, we can only ſpeak of perfect neutrals (65).

(64) I call thoſe neutrals who do not by treaty owe any thing to either party; for if they do, they are fœderates, or confederates, and not ſimply friends.

(65) The duties of fœderates in general, have employed the controverſial pens of many famous Juriſts. Bynkerſhoek thinks, that where two powers are at war with each other, a third power, equally and previouſly fœderated with each,

It is then the acknowleged duty of neutrals, *not to interfere in the war, and not to favour one party more than the other.* In this general rule all writers ſeem to agree, but when they deſcend to particulars, prodigious controverſies ariſe between the advocates for the claims of neutral, and the defenders of the rights of belligerent powers.

We do not, ſay the Neutrals, interfere in the war, nor favour one party more than the other, when we carry on the commerce which we always did, and trade with each party as if there was no war between them. What is their war to us? Are we to conſider the enemies of our friends neceſſarily as our enemies? We traded with them before the war, we will do ſo ſtill. We would have been their carriers during the peace between you, if they had aſked us. We are ready to be ſo ſtill. We are ready to ſerve both parties with the ſame promptitude and zeal. We do not ſhew any favour to one, which is refuſed to the other. But are we to ſuffer in our rights becauſe you chuſe to go to war? Is our commerce to fail,—our ſovereignty to be invaded—our commodities to remain unſold—and our people to ſtarve, be-

and bound to furniſh auxiliaries or aſſiſtance, ſhould aſſiſt what it thinks the juſter cauſe, but never embarraſs itſelf with any engagement to either during the war. If they both are at war with a ſtranger, the fœderate is to aſſiſt each equally according to him.

cauſe you chuſe to quarrel? Are you to ſtrip us, in order to annoy your foes? No; we have a right to trade in war, as we traded in peace. We have a right to uſe our induſtry in whatever mode we think beſt, navigation is free, the ſea is open, and our natural powers are not to be reſtrained.

Before we examine, ſay the Belligerents, your complicated aſſertions, part of which are falſe and part are true, permit us to clear out of the way a prefatory queſtion! Do you really mean that no commerce with the enemy is prohibited by the law of nature and nations, and aſſert the univerſal legality of commerce with him, without any limit or exception?

No, replies the Neutral, I admit exceptions; for inſtance, it is prohibited to carry contraband of war, and to go to blockaded ports.

Though we do not ſee, ſay the Belligerents, how or why, conſiſtently with the univerſality of your notions on the freedom of commerce, even theſe exceptions are made by you: yet, as we are ſo far agreed, we admit the conceſſion, and proceed to examine the remainder of your poſitions.

You begin by wrongly ſuppoſing (as indeed the greater part of your doctrine is founded on falſe ſuppoſition, and formed of ſophiſm) that we pretend to prevent your *uſual* commerce *with* the enemy—no ſuch thing—purchaſe from him what is wanting *for your own conſumption*, or ſell to

him your uſual *peace ſupply* of articles. Increaſe your purchaſes to any amount in the belligerent countries, *provided* your own conſumption requires it, and provided you remain domiciled in your own country. But if you begin to *carry* much more than your own occaſions require, and than you did in time of peace—if you open a *carrying* trade which was then unknown, and extend the faculty of carrying for the belligerent, where he was in the habit of carrying for himſelf before, to your excluſion; if you thus turn *carriers* for him; you are trading not *with* the enemy, but *for* him. You are doing that which he is not able to do for himſelf, and which he would neither aſk nor permit you to do in time of peace. You enable him by theſe means to preſerve his ſources of revenue, and yet meet us with undiminiſhed ſtrength. Every man that you lend to his trade, enables him to furniſh a man to his own hoſtile fleets. You enable him to come to the war with augmented ſtrength, which he could not have had without your aid. You profeſs to be neuter, and you are giving to our foes the moſt powerful aſſiſtance, equivalent in its effects to furniſhing him with the ſtrongeſt military aid (66). Beſides, what do

(66) See the moſt able, learned, and ingenious work, lately publiſhed by Mr. Ward, on the rights and duties of neutrals, which doth him great honour. It is ſurpriſing that Mr. De Martens, though an Hanoverian ſubject of his majeſty, ſhould have publiſhed a work on the ſame ſubject, replete with every falſe principle.

you do more? You claim a right, and exerciſe it, of conducting and undertaking for the enemy, not only their carrying trade abroad, but their coaſting trade at home. By extraordinary vigilance and exertions of wonderful labour, by means of fleets lying perpetually on their coaſts, we have baffled their convoys going from one port to another at home, or from dock-yard to dock-yard, for the purpoſes of aſſiſting and furniſhing the naval equipments of their fleets, and have thereby retarded or prevented their projected expeditions to annoy us; and now you tell us, you will undertake this buſineſs for them; you will ſecure this intercourſe ſo hoſtile to us, and that, provided it anſwers your own mercenary views, you regard not the conſequences to us. To uſe the words of Vattel, book 3. ch. 7, a nation that, without any other motive than the proſpect of gain, is employed in ſtrengthening my enemy, without regarding how far I may ſuffer, is certainly far from being my friend, and gives me a right to conſider and treat it as the aſſociate of mine enemy.

As to ſaying (continue the advocates for the belligerents) that you do no injury becauſe you favour both equally, it is a ſophiſm (67). What

(67) It is a ſophiſm, indeed, of modern invention. The great juriſts of the laſt century totally diſclaimed it. Grotius indeed ſays, that the neutral ſhould favour the juſter ſide; but Bynkerſhoek truly obſerving, that the juſtice of the cauſe is no buſineſs of the third power, and aſking who made him a judge, in continuation makes this plain and

we aſk of you is to aſſiſt *neither*, not to aſſiſt *both*. You cannot aſſiſt each equally, unleſs we were exactly on a par. Now at the time we complain, we happen to be ſuperior. We do not want your aſſiſtance, the enemy doth; and if you had not furniſhed it, the enemy muſt have been brought to reaſon, and that war, the miſeries of which you have prolonged, would have been terminated.

As to your *right* of trade with our adverſary, we do not deny it, as far as it extends; but your claims go infinitely beyond your right. We alſo have a right, the right of ſecurity, againſt your ſtrengthening the enemy. Where there is a conflict of rights, one can be aſſerted only, ſubject to the diminution occaſioned by the other.

We do not therefore invade your ſovereignty; we do not want to make your commerce leſs than it was before the war, to prevent your importations for your own uſe, or the ſale of commodities not

ſenſible remark: "Si medius ſim, alteri non poſſum prodeſſe ut alteri noceam. Sed aies utrique mittam quicquid mihi videbitur, ſed noli ſic ſapere, quin potius crede, amicorum noſtrorum hoſtes bifariam eſſe conſiderandos, vel ut amicos noſtros, vel ut amicorum noſtrorum hoſtes, recte iis omnibus adeſſe licet ope, concilio, armis; quatenus autem amicorum noſtrorum hoſtes ſunt, id nobis facere non licet, quia ſic alterum alteri in bello præferremus. Præſtat cum utroque amicitiam conſervare quam alteri in bello favere, & ſic alterius amicitiæ tacite renunciare."——See Grotius, lib. 3. ch. 17. ſec. 3; and Bynkerſhoek, Q. Jur. Publici, cap. 9. De ſtatu belli inter non hoſtes.

contraband in places not blockaded. Your commerce, your manufactures, your people, your rights, remain juſt as they were before in time of peace, ſave and except as far as they counteract our evident rights. But you are not to profit(68) by our misfortunes and the calamities of war, by carrying on a *new* trade to our deſtruction.

Such is the general outline of this famous controverſy, on the rights and duties of neutrals, between their partizans and thoſe of the belligerent naval power, which is ſtronger in the war, for the weaker will for the time being pretend to adopt the reaſoning of the neutral (69).

(68) Hubner doth not ſcruple to avow this principle of unworthy and unjuſtifiable gain. Neutrals, ſays he, cannot refuſe to themſelves ſo conſiderable an advantage; *i. e.* ſays Mr. Ward, as much as to ſay, the wars of others, inſtead of calling for all their ſincere good offices for the redreſs of the injured party, or at leaſt for the re-eſtabliſhment of peace, are in truth the harveſt of neutral powers, by making them the carriers of the weaker party.

(69) In this reſpect the French, certainly a weaker naval power than us, have been ridiculouſly inconſiſtent with themſelves. In the reign of Francis the Firſt, and for many years after, they held that enemies' goods in the ſhips of friends, and friends goods in the ſhips of enemies, were confiſcable. In the preſent war, they attempted to confiſcate all goods of Britiſh manufacture, though *bonâ fide* the property of neutrals. Yet they have ſince exclaimed, with the utmoſt vehemence, becauſe the firſt only of the above principles, and the only one founded in truth and juſtice, has been by us adopted.

In this controverſy, the advocates for the extent of the neutral claims are clearly wrong, if we are to judge by the law of nature and nations, by uſage, or by recourſe to the greateſt authorities. If they reſt upon convention, that can only affect the parties who enter into that convention.

My original deſign doth not oblige me, nor doth the compaſs of this work allow me, to ſupport articulately, and at great length, the poſitions which have been juſt advanced; however, they ſhall be ſupported when we come more into detail.

Suffice it for the preſent to obſerve, that both the law of nature and nations hold the maxim, *Sic utere tuo ut alienum non lædas:* that the uſage of nations, uninterrupted until the middle of the eighteenth century, about fifty years ſince, was directly oppoſite to the preſent claims of neutrals—and that theſe claims have been reprobated by Grotius, Bynkerſhoek, Heineccius, Valin, and Vattel, on the continent, added to many moſt able writers in Britain, and to the very high authority of the uncommonly eminent judge who now preſides in the Britiſh court of admiralty ſupported by the greateſt learning and ſtrongeſt argument in repeated deciſions.

Having thus ſtated the theory of the controverſy, I proceed to its active effects on the nations of Europe.

The Principles of the Armed Neutrality.

The doctrines above ſtated, as being founded in nature and truth, were univerſally received by the nations of Europe, until the middle of the laſt century; indeed, ſo univerſally, that no doubt was ever ſtarted on the matter, nor mention made of any ſuch controverſy as has in our days diſturbed the peace of Europe with contentions about the rights of neutral commerce. One claim, indeed, was ſet up by belligerent powers, much more adverſe to the wiſhes of neutral ſtates than any advanced in the preſent times, which was, that no neutral power ſhould be allowed to carry on any trade or commerce whatſoever with the enemy, even in their own commodities, carried on their own account (70), and not contraband.

This extravagant pretenſion in the belligerent to interdict all commerce whatſoever between neutrals and his antagoniſt, which was in the ſeventeenth century ſupported with great heat, and actually aſſerted by the Engliſh and Dutch as againſt France in the year 1689, has been long ſince relinquiſhed by all nations, except as France herſelf in the preſent war ſhewed a diſpoſition to adopt

(70) See Grotius, De Jur. Bell. lib. 3. 1. 5. who condemns the doctrine in its full extent, but admits it as far as relates to contraband of war, and even farther, if neceſſary, making in the laſt caſe compenſation.

the ſpirit, by pretending to confiſcate all Britiſh manufacture, although *bonâ fide* the property of neutrals. And it is an inſinuation againſt Britain utterly unfounded, that ſhe wiſhes to prevent and cut off the whole trade of neutral powers, or to render it nugatory, even when carried on for their own account.

But the pithy ſentence, ſo captivating to vulgar ears, and ſo little underſtood (71), that free ſhips make free goods, was unheard of and unknown, until the late King of Pruſſia, uſually termed Frederick the Great, attempted to introduce the novel maxim in the war of 1745; and his claims were ſet forth at large in a memorial from his miniſter, Mr. Michel, to the Duke of Newcaſtle, in the year 1752 (72). Some Pruſſian veſſels, under the profeſſion of neutrality, had violated the law of nations, by giving the moſt obvious and unjuſtifiable aſſiſtance to our enemies. The courts of admiralty in England had paſſed ſentences on their cargoes accordingly. The King of Pruſſia

(71) Le Pavillon neutre couvre la merchandiſe. *Vry ſchip, vry gud.* Every man verſed in parliamentary buſineſs, as well as the members of the Corps Diplomatique, knows the magic of a terſe or quaint expreſſion floating among the vulgar, even though oppoſed to reaſon.

(72) Sir James Marriott has given us a curious anecdote: he ſays, that one great ſource of the Pruſſian reſentment aroſe from a ſmart ſaying of Lord Granville (Carteret), that he had never heard of the flag of Berlin, and ſhould as ſoon expect to hear of the flag of Frankfort.

put in a claim perfectly new, and, (as we ſhall ſhew hereafter, directly oppoſed to every principle of the law of nations, and even of the Roman law ſo much received and reſpected in Germany), to try the matter over again by a court of his own; which having, as may be ſuppoſed, decided in favour of his own ſubjects, he proceeded to execute its ſentence, by taking upon himſelf of his own authority in the manner of repriſals, to cancel a large debt which he had incurred to private merchants in England for money lent to aſſiſt him in his wars, and which had been ſecured on his new conqueſts in Sileſia.

This conduct, and the memorial above mentioned, entitled Expoſition des Motifs, &c. produced the celebrated anſwer which doth ſo much honour to Britain, and which has been juſtly ſaid to contain a thorough inveſtigation and juſtification of the principles adhered to by the court of admiralty in England, in caſes of capture of the ſhips and property of neutral powers in time of war, and it has ever ſince been received as the great ſtandard and guide in matters of this nature (73). We ſhall not be ſurprized at its fame and authority, when we hear that it was compoſed by the united abilities of Lord Mansfield, then ſolicitor-general; Sir George Lee, then judge of the prerogative

(73) This anſwer is univerſally known, and is to be found in many books and collections; amongſt others, in the Collectanea Juridica.

court; Doctor Paul, then advocate-general; and Sir Dudley Rider. All Europe coincided in acknowledging its truth. Monteſquieu calls it *Reponſe ſans Replique*. The King of Pruſſia ſubmitted to its cogency, and the intereſt of the Sileſian loan was no longer with-held.

What then muſt be our ſurprize, when, in oppoſition to theſe well-known facts, we find Mr. Schlegel ſaying, that it was matter of aſtoniſhment that the Engliſh government and lawyers, inſtead of following the progreſs of information, ſhould be more than a century behind in the knowledge of the law of nations, which he pretends had been altered by the Dutch at that period, to the principle that *le pavillon neutre couvre la merchandiſe*. This alteration, he ſays, they made, becauſe, being then the carriers of Europe, they felt themſelves more particularly intereſted in its adoption. How the Dutch could alter the law of nations, ſo as to affect other powers, who like Britain did not adopt the ſame alteration, he leaves totally inexplicable, and indeed it is abſolute nonſenſe. In the mean time be it obſerved, that in ſtating it to be an alteration, he admits what the law of nations originally was, and ſtill is, and from which Britain never has ſwerved. But of this more hereafter, when we come to conſider the queſtions in detail.

The pretenſions ſet up for the firſt time by the King of Pruſſia, though then by him abandoned, were never forgotten by the nations moſt accuſ-

tomed to the carrying trade, whoſe inordinate love of gain induced them, at a ſubſequent period, from theſe embryos to create more extenſive claims, and to advance them with a firmer front, than that ſhewn in the modeſt queres of the Pruſſian miniſter, who rather aſked for explanation, than aſſerted principle. Theſe latter claims, which came to their full maturity in the year 1780, and which were then urged and inſiſted on by Ruſſia, Denmark, and Sweden, may be reduced to the following heads.

1ſt. That all neutral ſhips may freely, and without controul, navigate from port to port, and on the coaſts of nations at war, to whomſoever their cargo may belong.

2dly. That the ſhip covers the cargo, *or* free ſhips make free goods, i. e. that the effects belonging to the ſubjects of the warring powers, except contraband merchandize, ſhall be free in all neutral veſſels.

Or theſe two propoſitions may be thus combined in one; that free ſhips make free goods, and therefore that neutrals have a right to coaſt from port to port, and to trade from colony to colony, and from the colonies to the mother country of belligerents, although carrying enemies' goods, without being liable to ſearch and detention, except for contraband of war, or unleſs they are going to a blockaded port.

3dly. That contraband is confined to articles of excluſive and immediate ſervice in war, or to

ſuch as are declared to be contraband by treaties.

4thly. That no place ſhall be conſidered as blockaded, until it is ſurrounded in ſuch a manner by hoſtile ſhips attacking it and keeping their places, that no perſon can enter into it without manifeſt danger.

5thly. That the courts of the capturing belligerent are not competent to entertain queſtions concerning neutrals captured or detained on the high ſeas.

6thly. That the right of ſearch is not a natural right, and is confined to the inſpection of papers.

7thly. That the flag of the State excludes all right of ſearch whatſoever, and whatever is done under cover of it, excludes the juriſdiction of courts of prize, and becomes matter of repreſentation between State and State.

8thly. That neutral veſſels muſt not in any caſe, though without convoy, be ſtopped, except for juſt cauſe, and on clear evidence. That the proceſs muſt always be uniform, prompt, and legal; and if loſs be ſuſtained, not only damages muſt be paid to the individual, but ſatisfaction be made to the State for the inſult.

9thly. To the above poſitions, ſome modern Utopian writers have added the following; that war means military war, and commercial peace; that is, that no private property can be the ſubject of prize.

I ſhould now proceed to the refutation of theſe extravagant, though in the view of ignorance or incaution, perhaps plauſible claims, with the brevity ſuited to ſuch a treatiſe as this, leaving their full and detailed refutation to the very able pens which have been, and are, ſtill employed in expoſing them; particularly that of Mr. Ward, who, in a celebrated work, (part of which has been publiſhed,) with incontrovertible force, argument, and weight of authorities, is buſied in demoliſhing to the ground the viſionary ſtructure erected by Hubner and Schlegel. But I muſt firſt ſtate what are the principles of Britain upon theſe ſubjects, that we may ſee the oppoſite propoſitions held by her in their full contraſt, and the ſupport of them will be the beſt and cleareſt mode of confuting her adverſaries.

The Principles adopted by Britain reſpecting Neutral Commerce.

1ſt. That free ſhips do not make free goods; or, in other words, that the property of enemies found on board the ſhips of friends is confiſcable; but this confiſcation doth not extend to the carrying ſhip, which is even entitled to freight, except in certain excepted caſes.

2d. That the goods of a friend (if lawful and not contraband) found on board an enemy's ſhip, are not ſeizable, but ought to be to him reſtored.

3d. That contraband goods going to the enemy, even though the property of friends, are ſeizable as prize, becauſe they enable the enemy the better to carry on the war, the doing which is a departure from neutrality. And that contraband is not always, or excluſively confined to implements of war.

4th. That by carrying contraband, the freight and expences are forfeited, but not the ſhip, unleſs the contraband belongs to her owner, or there be ſome particular circumſtances of aggravation.

5th. That neutral veſſels breaking a blockade, are liable to confiſcation, if conuſant of the blockade either by notification or by fact, but not ſo as to their cargo, unleſs the owners of the cargo were conuſant of the blockade; and that the accidental abſence of the blockading force doth not remove a blockade.

6th. That the right of viſiting and ſearching merchant ſhips upon the high ſeas, and not merely their papers but their cargos, whatever be the ſhip, its cargo, or its deſtination, is an inconteſtible right of the lawfully commiſſioned cruiſers of every belligerent nation.

7th. That the ſovereign of the neutral country cannot, conſiſtently with the law of nations, oppoſe this right of ſearch.

8th. That the penalty of oppoſing this right of ſearch, is the confiſcation of the property ſo withheld from viſitation.

9th. That on the breaking out of a war, it is the right of neutrals to carry on their accuſtomed trade, except in contraband articles, or except they go to places blockaded; but that the coaſting and colonial trade of the enemy cannot be their accuſtomed trade.

10th. That though a maritime neutral power ſhould ſtrictly abſtain from carrying the trade of a belligerent, or ſupplying him with contraband, yet if he opens his ports to his privateers for the purpoſes of hoſtile equipment, if he gives him ſhelter for his prizes, and lends him his courts, or ſuffers him to erect his own for the purpoſes of condemnation, this is a breach of neutrality and cauſe for war.

11th. That before a ſhip or goods captured can be diſpoſed of by the captor, there muſt be a regular judicial proceeding for trying the legality of the prize, wherein both parties muſt be heard.

12th. That the proper and regular court for trying the legality of a prize, is the court of that State to which the captor belongs.

13th. That this court muſt judge by the law of nations and by treaties, and according to an eſtabliſhed method of determination univerſally and immemorially received in the maritime law of nations.

But it will be neceſſary to go more at large into the ſentiments of Britain on theſe ſujects,

and into the examination of the juſtice of thoſe ſentimen ts on each ſpecific queſtion; and firſt,

Of Enemies Goods found in the Ships of Friends.

The law of nature is the law of reaſon, and reaſon dictates that an enemies property may be taken wherever it can be found 74). It is not in the power of a third party, by his interpoſition, legally to protect it. If he could thus protect his goods, he might alſo his perſon and his lands, and thus render him invulnerable to me. But what is this but to depart from neutrality,—to become an avowed auxiliary of my adverſary, and an open enemy of mine. If the neutral has fairly purchaſed the goods from my adverſary for his own uſe and conſumption, they are his and not the enemies, and I have no right to touch them; no more than if he is carrying his own goods, not contraband, to ſell to the enemy, have I a right to impede him. But if he is carrying *for* the enemy, I have a right to ſeize the enemy's property thus carried; and to aſk Britain to concede to a contrary doctrine, is to aſk her to waive all common ſenſe and to ſuccumb to the will and

(74) A nation has a right to deprive the enemy of his poſſeſſions and goods; of every thing which may augment his forces, and enable him to make war. Vattell, book 3. ch. 9. ſec. 161. and that in neutral hands, book 3. ch. 7. ſec. 507. Burlamaqui ſays the ſame thing. Political Law, book 4. ch. 7. So Grotius, Bynkerſhoek, and Heineccius, as ſhall be ſhewn preſently.

power of her enemies, in order to gratify the avarice and love of gain which actuates nations pretendedly neutral.

Theſe poſitions are ſupported by every great authority. Grotius, indeed, buſily employed in conſidering a queſtion now obſolete, viz. whether *all* commerce of neutrals with an enemy may be interdicted, ſcarcely touches upon this, becauſe it was never ſuſpected in his times, that the principle above aſſerted could admit of controverſy; but his opinion is ſufficiently clear, becauſe in one of his own notes (75), he recites and adopts, without comment, the rule on this ſubject of the book ſtiled *Conſulatus Maris*; which, as he obſerves, ſays, that *Si navis ſit pacem colentium, merces autem hoſtium, cogi poſſe ab his qui bellum gerunt navem ut merces eas in aliquem portum deferat, qui ſit ſuarum partium;* and the ſame appears *a fortiori* from his not entirely negativing the much ſtronger poſition advanced in the Conſolato del Mare, that a neutral veſſel ſhall not carry on *its own* trade with a belligerent.

We are ſtrengthened then by the opinion of Grotius, who therein agreed with that celebrated more ancient authority the Conſolato del Mare, and with an eminent author who lived not long before him, Albericus Gentilis.

(75) On the fourth ſection of the firſt chapter, third book, De Jure belli & pacis.

Mr. Ward has ſucceſsfully ſhewn, that Puffendorf was of the ſame opinion; and Bynkerſhoek, in his queſtions of public law (76), treating of this very point, ſays, why do you doubt? ſince I have a right to ſeize whatever belongs to the enemy (77). I take that which is the enemies, and which by the right of war belongs to the victor; and adds, in another place, *quod omni jure licet, & perpetuo obſervatur.*

The illuſtrious civilian Heineccius, a cotemporary of Bynkerſhoek (and mentioned by him as coinciding in opinion on this point) ſays in expreſs terms: No one doubts that enemies property, found in the ſhips of friends, may be taken and ſeized, becauſe one enemies power over the property of another his enemy, wherever he finds it, is uncontrouled (78).

Vattell ſays, the effects belonging to an enemy found on board a neutral ſhip, are ſeizable by the rights of war; and Burlamaqui, when he ſays, that enemies goods found on board the ſhips of friends, if there put by conſent of the owners,

(76) Ch. 14. De hoſtium rebus in amicorum navibus repertis.

(77) Quid dubitabis, cum recte occupem quicquid hoſtium eſt.

(78) De nav. ob. vec. Merc. Vetit. Comm. ſec. 8. Res hoſtiles in navibus amicorum repertas capi poſſe nemo dubitat, quia hoſti in res hoſtiles omnia licet, catenus ut eas ubicunque repertas ſibi poſſit vindicare.

may make the ſhip lawful prize, confirms the ſame opinion in its fulleſt extent.

Theſe authorities are (79) again ſupported by numerous treaties, coming down to our times, ſtipulating for the exemption from ſeizure of enemies goods, on board the ſhips of the friendly ſtipulating party, as a favour and privilege, thereby ſhewing the conſent of all the nations who have obtained ſuch articles in treaties, i. e. of all the nations of Europe, that the general rule was as above ſtated: *exceptio probat regulam.*

When we conſider theſe treaties and theſe authorities, and reflect that they come down almoſt to our own times, many of the treaties alluded to being made even in the eighteenth century, and Bynkerſhoek and Heineccius having flouriſhed down to the middle of that century, and others of the eminent writers above mentioned, at a later period, what ſhall we ſay to the courage of Hubner and of Schlegel, inſinuating that the law of Europe was altered in this reſpect by univerſal conſent, about the middle of the ſeventeenth century; and what muſt be our ſurprize when we find Mr. De Martens, a profeſſor of the law of nations, on the foundation of his Britannic majeſty at the univerſity of Gottingen, (and whoſe authority is therefore much relied on by Schlegel) ſaying, that it is an eſtabliſhed principle, and

(79) On the other hand, there are numerous treaties in which this exception is either not mentioned, or it is expreſsly ſtipulated that the privilege ſhall not be enjoyed.

has been ſo ſince the middle of the ſeventeenth century, that a neutral ſhip covers hoſtile cargo (80).

The contrary principle cannot admit of diſpute; and, as Mr. Ward has truly obſerved, if the whole power of the reſt of Europe were ſucceſsful in obliging Britain to relinquiſh it, it would ſtill be true, and ſtill part of the original law of nations, abſtracted from convention and treaty.

I proceed then to conſider, the only conſideration indeed which excited any doubt in the minds of the great Juriſts above mentioned, what is the effect of the ſeizure of enemies property on board a neutral ſhip, upon the ſhip itſelf.

By the ancient laws of France, and of many other parts of Europe, the neutral ſhip which carried enemies goods was confiſcated (81).

In the Conſolato del Mare, it is held, that though the neutral veſſel may be compelled to carry the enemies cargo to a place of ſafety, yet it muſt be paid the whole freight which would have been earned at the delivering port; which therefore plainly implies, that the veſſel is not

(80) In a brief treatiſe purporting to ſtate the rights and duties of neutrality, in which there are almoſt as many erroneous poſitions as there are lines, and ſcarcely one conformable to the true law of nations, as we ſhall ſee in our progreſs. From Gottingen ſurely opinions ſo hoſtile to Britain, and to the true law of nations, were not to be expected.

(81) See Bynkerſhoek, Qu. Pub. Jur. cap. 14.

confiſcable; and Grotius, in a note on his Treatiſe de Jure Belli & Pacis, confirms this opinion (82). But in another work, he has recourſe to a diſtinction found in the Digeſt (83), between the goods being embarked with or without the knowledge of the maſter, holding that in the former caſe the ſhip is confiſcated, in the latter not (84).

Bynkerſhoek (85) doth not agree entirely with any of the opinions hitherto mentioned as to the ſhip and freight. He ſees no reaſon for the rule in the Conſolato, that freight is to be paid to the neutral ſhip, becauſe, ſaith he, the freight cannot be due when the merchandize doth not reach to its deſtined port; and as to the diſtinction taken by Grotius from the Roman law, though he admits that *in iis quæ ſola ratio commendat, a jure Romano ad jus gentium, tuta ſit collectio*; yet he inſiſts that the maxim of Paulus relates only to ſmugglers and illicit trade, and though that prin-

(82) Lib. 3. c. 1. ſec. 4.

(83) De Publicanis & Vectigalibus, by Paulus. But Heineccius inſiſts, that this ſaying of Paulus is not rightly underſtood, and that the neutral has a right to take on board the enemies goods, and ſo has the belligerent to ſeize them. Jure ſuo utuntur qui res ferunt, & etiam qui auferunt.

(84) Quoted by Bynkerſhoek, cap. 14. Loccenius agrees with him.

(85) Quæs. Jur. Pub. cap. 14.

ciple juſtifies the confiſcation of a ſhip for defrauding the revenue, or carrying *contraband* to the enemy, it doth not extend to the loading a neutral ſhip with a cargo belonging to the enemy, for that is licit (86).

Vattell contents himſelf with ſaying ſimply, that by the law of nature, the maſter is to be paid his freight, and not to ſuffer by the ſeizure; and Burlamaqui's words are, "Neither do the "ſhips of friends become lawful prizes, though "ſome of the enemies effects are found in them, "*unleſs* it is done by conſent of the owners, who "by that means ſeem to violate the neutrality or "friendſhip, and give us a juſt right to treat "them as enemies (87)."

The rule of Britain (88) appears to adopt the moſt liberal extent that the moſt liberal of the writers above cited have allowed. It doth not con-

(86) This is not very clear. If it be licit, how then is the cargo ſeizable? It is, however, very intelligible, particularly in England, which allows him freight, though it takes the cargo, thereby admitting the trade was licit. But would it not be much more intelligible to ſay that the trade is illicit, the owner being conuſant; and that the reſtoring his ſhip, and giving freight, are favours.

(87) Politic. Law, part 4. ch. 7. ſec. 23.

(88) See the anſwer to the Expoſition des Motifs, and the caſe of the Rebecca, 2 Robinſon, p. 101. in that caſe it is ſaid freight is given to the veſſel employed in trade between the ports of different enemies, if *bona fide*.

fiſcate the ſhip (89), and it even gives freight (90), if there are no falſe papers on board, nor refuſal to ſhew them, or to be ſearched, or unleſs the neutral ſhip was employed in the enemies coaſting trade, or between the ports of the mother country and a colony of the ſame, or of another enemy; or laſtly, unleſs the goods be contraband.

The principle on which freight is refuſed in the coaſting and colonial trade is, that theſe are not the *accuſtomed* trades of the neutral, but were before the war generally ſhut up to the excluſive uſe of the mother country (91).

(89) Si dolus apparet, nil Juſtius quam ut navis fiſco vindicetur. Heineccius de nav. ob. vet. merc. vec. commiſ. ſec. 12. It is ſaid in Smart and Wolf, 3 Term Reports, p. 334, that formerly many Dutch neutral ſhips laden with the property of the enemy, were condemned without reſerve, ſhip as well as cargo; ſee. 1. H. Blackſtone, p. 191.

(90) It is contended in the ſame caſe of Smart and Wolf, that the taking cognizance of freight, was a novel uſurpation of the prize court; and that there was no inſtance of its having been awarded to neutral ſhips for the goods of enemies condemned before the American war; if ſo, the conduct of Britain, ſo far from being more harſh than formerly, has been relaxed. The objection to their taking cognizance of freight was totally unfounded; the common law could not, for it would involve the queſtion of prize, contraband, &c. and ſo ſays Lord Kenyon.

(91) See the principles laid down by Sir W. Scott, in the caſe of the Immanuel, 2 Rob. p. 198.

It muſt be remembered, that for the greater accommodation of the neutral power, the commiſſioners of the navy are, by the prize acts, empowered to purchaſe, for the king's uſe, naval ſtores or proviſions on board neutral ſhips going to the enemy, and brought into port by the king's men of war; and in general, all the native produce of the neutral country going to the enemy, is liable to capture, ſubject to a right of pre-emption (though formerly confiſcable) by which right of pre-emption is meant, a right of purchaſe upon a reaſonable compenſation.

Of the Goods of Friends found on board Enemies Ships (92).

The doctrine of Britain, and of moſt nations on this ſubject at preſent is, that the goods of friends on board enemies ſhips are to be reſtored; and it is remarkable that France, now in her weaker naval ſtate ſo much inclined to cry out for the rights of neutrality, was ſingular in adopting the contrary principle, under the affected but well-known phraſe, *robe de l'ennemi confiſque celle d'ami*; and in the more general maxim, *ex rebus naves, & ex navibus res prædæ ſubjiciuntur*; and Heineccius notes, that Francis I. of France, eſtabliſhed it as a maxim, that *naves neutrorum*

(92) The diſcuſſion of this queſtion is found in Bynkerſhoek. Quæs. Pub. Jur. cap. 13.

rebus hoſtium onuſtæ, et naves hoſtium una cum mercibus amicorum fiſco vindicentur. Hein. de nav. ob. vet. mer. vec. com. ſec. 9.

The rule of Britain is ſaid to depend upon this principle, that every man is allowed to tranſport his merchandize in the ſhip of his friend, though that friend happen to be our enemy. But it may alſo be conceived to conſider the act as illicit, and the reſtoration as a matter of favour. Heineccius, however, and almoſt all writers, conſider it as perfectly licit. Grotius appears to have doubted of the juſtice of this rule at an earlier period of his life, about 1602, when the Dutch had taken Italian property to a conſiderable amount on board Portugueſe ſhips (93); but afterwards, when he wrote his treatiſe De Jure Belli & Pacis (94), fully accedes to the principle, in which Bynkerſhoek (95), and indeed the general modern practice

(93) Lib. 11. Hiſtor. Belg.

(94) Publiſhed about the year 1625.

(95) Cap. 13. Quæs. Jur. Pub. de Amicorum bonis in hoſtium navibus repertis. He doth not however coincide in Grotius's defence of the French code (which ſaid, ex rebus naves, & ex navibus res prædæ ſubjiciuntur) by explaining that this ſuppoſes the knowledge of the owner of the cargo, for that would go to confiſcate the friends property in the enemies ſhips, as well as the enemies ſhip carrying the friends goods; and he accuſes Grotius of contradiction in not here admitting the rule of reciprocity. It may be true, but if Grotius had ſaid that both trades were illicit, and that the exemptions were matter of favour, there would have been no contradiction.

coincides with him; and both coincide with the Conſolato del Mare, which ſays, that if the friendly owner of the cargo will not enter into ſome reaſonable agreement on account of the ſhip, the captor may ſend the veſſel home to his own country; and in this caſe the merchant ſhall pay the freight which was to be paid at the delivering port, and the captor is not anſwerable for damages. If the captor will not be ſatisfied, he is anſwerable for damages; and Heineccius ſays, *vix ullam excogitare rationem poſſumus quare merces amicorum in navibus hoſtium nobis acquirantur. Inhumana eſt conſuetudo. De Nav. ob. vet Mer. ſec.* 9. Here again we are covered with aſtoniſhment by an aſſertion of Mr. De Martens, contrary to all fact and experience (96), that it is a principle now eſtabliſhed, and which has been taken as the baſis of almoſt every treaty ſince the middle of the ſeventeenth century, that neutral property is confiſcated together with the hoſtile ſhips, in which it is ſeized. If continental Europe has ſuch advocates, ſhe ſurely will not complain of Britain for illiberality (97).

(96) On the rights and duties of neutrality.

(97) Without doubt, the owner of neutral property on board the enemies ſhip, will ſuffer much inconvenience; but his loſs, ſays Vattell, is an accident to which he has expoſed himſelf, and the captor in making uſe of the law of war, is not anſwerable for any accidents reſulting from it, no more than if a neutral paſſenger, who happened unfor-

Of Contraband.

This diſcuſſion reſolves itſelf into two parts; what is contraband, and what the effect or penalties of carrying it, on the ſhip, or the innocent part of the cargo, if ſuch there be; for that powers at war may ſeize and confiſcate all contraband goods going to the enemy, is univerſally acknowledged (98).

Many vain attempts have been made by writers in the cloſet to form exact enumerations of what are contraband goods; and, even where treaties have undertaken to ſpecify them, they have left endleſs room for doubt. Vattel, therefore, wiſely ſays, they are *ſuch as* arms, military and naval ſtores, timber, horſes; and even proviſions when there are hopes of reducing the enemy by famine. The truth is, they muſt ever be fluctuating, and depend upon the circumſtances and *ſtatus belli*. Thus Grotius ſays, that in judging of articles of a

tunately to be in an enemies ſhip, ſhould be killed in the engagement, book 3. ch. 7. ſec. 116.

All writers agree that the fair preſumption is, that all goods found on board an enemies ſhip are the enemies, till the contrary be proved.

(98) Beawes, in his Lex Mercatoria, has given the attempted enumeration of contraband in certain treaties.—Hubner has attempted to enumerate them: but none of the great authorities, Grotius, Bynkerſhoek, Heineccius, and Vattel, ever attempt a ſpecific enumeration. They ſaw the impoſſibility and the abſurdity of ſuch an attempt.

doubtful nature, our judgment muſt be guided by the ſtate of the war (99); and Heineccius admits, that a particular ſtate of the war may convert a thing inſtantly into contraband in its own nature of the leaſt importance (100), for inſtance tobacco; and thus articles of the greateſt conſequence, ſuch as proviſions (101), may or may not be contraband, according to circumſtances. Among favourable circumſtances are theſe, that the articles ſhould be of the growth of the country which exports them; that they ſhould be in their native and unmanufactured ſtate; and that they ſhould be intended for the ordinary uſes of life. So the nature and quality of the port to which the ſhip is going is not an irrational teſt; and thus the nature of the war is ſometimes our guide, as pitch and tar have been held contraband in maritime wars.

It has been contended (102), that in tranſporting articles of his own country's native produce, a man is not to be reſtrained; yet it is plain that this

(99) Diſtinguendus belli ſtatus.

(100) De Jur. Civ. Com. ſec. 12.

(101) In 1793, the American miniſter remonſtrated againſt Britain as ſtopping proviſions going to France, not as a conduct always contrary to the law of nations, but as then unneceſſary, proviſions being cheaper in France than in England. Britain, however, thought it neceſſary, and ſo did Spain and Ruſſia, then hoſtile to France, and all theſe powers perſiſted.

(102) See Mr. Ward on Contraband.

circumſtance can make no difference, where the rights of others are concerned; and though ſtreſs has been laid on the cuſtom among belligerent powers of purchaſing ſuch commodities from the neutral, that mode is eaſily ſhewn to be a relaxation of right, and not an acknowledgment of wrong: ſince, if there was not a right of preventing the voyage without paying for the cargo, neither could there be with ſuch payment, that circumſtance making no difference as to the original right of impediment and detainer.

The effect on the ſhip was formerly forfeiture, a penalty ſtrongly vindicated by Bynkerſhoek (103) and Heineccius (104). In modern practice, except where the contraband articles belong to the owner of the veſſel, or where the caſe is attended with particular circumſtances of aggravation, the penalty has been mitigated to a forfeiture of freight and expences (105).

With reſpect to the cargo, the contraband is forfeited; and if there be innocent articles, they alſo are forfeited, if they belong to the ſame owner, otherwiſe not, agreeably to the rule laid down by

(103) Publicabam quoque naves amicas ſi ſcientibus dominis contrabanda ad hoſtes deferrent; & niſi pacta impediant, omnino publicandæ ſunt, quia earum domini operantur rei illicitæ.—Bynk. Q. J. P. lib. 1. ch. 14.

(104) Certi juris eſt, ob merces illicitas, naves etiam in commiſſum cadere.—Hein. De Nav. ob. vet. Mer. Vec. Comm. ch. 2. ſec. 6.

(105) See 1 Robinſon's Reports, p. 288,

Bynkerſhoek, who ſays, "Omnino diſtinguendum "putem an licitæ & illicitæ merces ad eundem "dominum pertineant, an ad diverſos; ſi ad eun- "dem omnes recte publicabuntur, ob continentiam "delicti (106)."

We ſhould altogether diſtinguiſh, ſays he, in my opinion, whether the lawful and unlawful goods and merchandize belong to the ſame or to different owners. If to the ſame, they are all juſtly confiſcable, for the continuity of the offence.

And this is perfectly reaſonable; for though there is miſconduct in the owner of the veſſel, there is none on the part of the owner of the innocent part of the cargo.

Of Blockaded Ports.

Grotius and all writers on the law of nations admit, that no commerce or intercourſe whatſoever is to be allowed to a neutral with a blockaded port; but Grotius adds this limitation, if ſurrender or peace be expected (107).

This limitation Bynkerſhoek condemns, as neither agreeable to reaſon, nor to the conventional law of nations. "How doth reaſon," ſaith he, "make the neutral a judge of the probability "of the ſurrender or the peace? And will it be

(106) Quæs. Pub. Jur. cap. 12. whoſe title is, An Licitum ob Illicitum Publicetur.

(107) De Jur. Bell. & Pac. lib. 3. ch. 1. ſec. 5.

" ſaid, that if there be no ſuch expectation, any " thing may be carried to the beſieged? No; no " intercourſe whatſoever is allowable during the " ſiege (108)."

Grotius alſo conceived that the neutral was to pay damages; but if the neutral veſſel was ſtopped before it reached the town, it was only to be detained until ſecurity was given againſt ſimilar attempts. But the more modern Dutch juriſt (109) juſtly holds, that the property is to be confiſcated; nay, often the carriers puniſhed with corporal, if not capital puniſhment; and as to paying damages, he aſks, what individual could pay the damage ariſing from the town's not being taken?

Vattel ſays decidedly, " *All* commerce is *en-* " *tirely* prohibited with a beſieged town (110);" and adds, " If I lay ſiege to a place, or *only* form the " blockade, I have a right to hinder any one from " entering, and to *treat as an enemy* whoever at- " tempts to enter, or to carry any thing to the " beſieged without my leave, for he oppoſes my " enterprize, may contribute to the miſcarriage " of it, and thus cauſe me to fall into all the " evils of an unſucceſsful war." And both he

(108) Quæs. Pub. Jur.

(109) Quæs. Jur. Pub. lib. 1. cap. 11. Obſeſſis urbibus caſtris, portubus, an quicquam liceat advehere.

(110) Book 3. ch. 7. ſec. 117. he mentions the inſtance of the Dutch preventing the Engliſh intercourſe with Dunkirk when by them beſieged.

and Grotius mention the inſtance of Demetrius hanging up the maſter and pilot of a veſſel carrying proviſions to Athens, when by him almoſt reduced to famine, as recorded by Plutarch.

The humanity of modern times has departed from the ſevere ſtrictneſs of the law of nations, and contents itſelf with confiſcation; but this reſtriction upon neutrals is undiſputed, and the only controverſies that have ariſen have been, whether the place was blockaded, whether that blockade was ſufficiently notified, how far the penalties extend, and whether any particular circumſtances exempted from the penalty.

Nothing further is neceſſary to conſtitute a blockade, than that there ſhould be a force ſtationed to prevent communication, and a due notice or prohibition given to the party (111). It is not an accidental abſence of the blockading force, nor the circumſtance of being blown off by wind (if the ſuſpenſion, and the reaſons of the ſuſpenſion, are known), that will be ſufficient in law to remove the blockade (112); and taking advantage of ſuch accidental removal is mere fraud.

Due notice of the blockade may be by the ſimple fact, or by a notification accompanied with the fact. In the former caſe, when the fact ceaſes (otherwiſe than by accident, or the ſhifting of the wind) there is immediately an end of the blockade; but where the fact is attended with a public notification from

(111) 1 Rob. p. 87. (112) Ibid.

the government of the belligerent country to neutral governments, it muſt be ſuppoſed to exiſt till it is publicly repealed; and when it is diſcontinued, that alſo ſhould be publicly notified (113). When the notification is not accompanied with the fact, as was the caſe of a proclamation in the Weſt Indies in 1794, it is not ſufficient (114). To enquire, not at the mouth of the harbour, but in neighbouring ports, whether a blockade, after a conſiderable lapſe of time, is ſtill continued, has been allowed to diſtant nations, as to America for example, who had not means of conſtant information (115).

There muſt alſo, of courſe, be time for parties at a diſtance to get knowledge of a blockade; and where it is a blockade de facto, it ſhould be notified by the blockading force to veſſels going in, for thoſe coming out muſt be preſumed to know it (116); and as to thoſe coming in, I conceive, if it be proved that they actually did know it *by any means*, it is ſufficient.

A notification bars the plea of ignorance, for it is the duty of every government receiving it to acquaint its ſubjects (117); and though a notification proprio vigore doth not bind any country but that to which it is addreſſed, yet in a reaſonable time it muſt affect neighbouring ſtates with

(113) Rob. 171.
(114) Robinſon, p. 94.
(115) 1 Robinſon, 332.
(116) Ibid. 151.
(117) 2 Rob. 112—129.

knowledge, as a reaſonable ground of evidence (118).

Nothing but abſolute and unavoidable neceſſity will juſtify the attempt to enter a blockaded port; ſuch as admits of no compromiſe, and cannot be reſiſted; not the avoiding higher fees, or any ſlight difficulties (119); but the meaning of the blockade is not to be extended by the force blockading.

The ſailing with intent to evade a blockade is an overt act conſtituting the offence (120); and a blockade is juſt as much violated by a veſſel paſſing outwards as inwards. There are caſes indeed of innocent egreſs, where veſſels have gone in before the blockade; but if they attempt to bring out a cargo, it is a violation of the blockade, if it was taken on board after the commencement of that blockade (121).

If a ſhip break a blockade, though ſhe eſcape the blockading force, ſhe is, if taken in any part of the voyage, taken *in delicto*, and ſubject to confiſcation (122).

The ſhip attempting to break a blockade is, as we have ſeen, liable to confiſcation; its cargo may be ſo alſo, though not contraband, if the owners of that cargo were conuſant of the blockade before they ſent or ſhipped it, although they might

(118) 2 Rob. 112.
(119) Ibid. 127.
(120) 1 Rob. 156.
(121) 1 Rob. 88 and 151.
(122) 2 Rob. 130.

attempt to throw the blame on the carrier maſter, if ſuch an attempt was proved to be founded in artifice: but if they were really ignorant of the fact, the maſter is not their agent to bind them by his contract or his miſconduct.

Ships ſometimes obtain *licence*, and in honeſt caſes that licence is to be conſtrued liberally; ſo that it is a benefit incident to the licence, and inſeparable from it, that the ſhip ſhall be allowed to come out again; and a caſe has happened, where ſhe was allowed to come out with a returned cargo (123), although, without ſuch licence, a neutral veſſel would have no right to take out a cargo, unleſs put on board before the blockade, though ſhe might go out in ballaſt.

Where there is no licence, general excuſes, ſuch as thoſe of want of water and proviſions, are extremely diſcredited, on two grounds: 1ſt. That the fact of attempt to enter the port is ſtrongly againſt them; and ſecondly, that the explanation is always dubious, and liable to the imputation of coming from an intereſted quarter (124).

Of the Right of Search.

The right of ſearch, at leaſt, extending to the inſpection of papers, if not to a thorough examination of the cargo, with the little attention on

(123) Caſe of the Juno, 2 Robinſon's Reports.

(124) 2 Robinſon's Reports, p. 125.

this head to be paid to the flag, is thus diſtinctly expreſſed by Bynkerſhoek (125): "Non ex fallaci forte apluſtri, ſed ex ipſis inſtrumentis in navi repertis, conſtare oportet, navem amicam eſſe. Si id conſtet dimittam; ſi hoſtilem eſſe conſtiterit, occupabo. Quod ſi liceat, ut omni jure licet, & perpetuo obſervatur, licebit quoque inſtrumenta quæ ad merces pertinent, excutere, & inde diſcere, an quæ hoſtium bona in navi lateant."

Vattel's words on this ſubject are ſo emphatic, that they merit to be literally tranſcribed. "Without ſearching neutral ſhips at ſea," ſaith he, "the commerce of contraband goods cannot be prevented. *There is then a right of ſearching.* Some *powerful* nations have indeed, at different times, refuſed to ſubmit to this ſearch, as formerly France, in the reign of Queen Elizabeth. At *preſent*, a neutral ſhip refuſing to be ſearched, would from that proceeding alone be condemned as lawful prize (126)."

(125) It is not by a national flag, perhaps fraught with fallacy, but by the very inſtruments found in the ſhip, that its friendly character muſt appear. If it doth appear, I would diſmiſs it; if, on the contrary, it appear to be hoſtile, I would ſeize it; which, if it be allowed, as it is and always was by every law, it muſt be lawful alſo to ſcrutinize the inſtruments appertaining to the merchandize, in order to learn from thence whether any enemies goods are hid in the ſhip.

(126) Book 3. ch. 7. ſec. 114.

He adds, indeed, that to avoid inconveniences, violence, and every other irregularity, the manner of the ſearch is ſettled in treaties of navigation and commerce—and that, according to the preſent cuſtom, credit is to be given to certificates and bills of lading, produced by the maſter of the ſhip, unleſs any fraud appear in them, or there be very good reaſon for ſuſpecting their validity.

Both theſe great authorities appear to concur that there is a right of ſearch; but their expreſſions may poſſibly be ſaid to be ambiguous whether this right extends beyond the inſpection of papers. Let us here then have recourſe to the court of reaſon, and aſk ourſelves whether the *inſtrumenta* may not be as fallacious as the *apluſtre*—the papers as the flag? What real ſatisfaction can ever be had without an actual ſearch of the cargo? And if there be any thing irregular or vexatious in the circumſtances of that ſearch, the party is always liable to puniſhment by a tribunal which has never been known to paſs over ſuch offences, without inflicting proper puniſhment. Juſtly, therefore, did Sir William Scott, in a late moſt remarkable caſe, that of the Maria (127), or, as it is commonly called, of the Swediſh convoy, hold and maintain it, as it has been here maintained to be, one of the rules taken by the Britiſh nation from the general law of all nations, that the right of viſiting and ſearching merchant ſhips upon the high

(127) Robinſon's Reports, 340.

ſeas, whatever be the cargoes the ſhips or the deſtinations, is an inconteſtible right of the lawfully commiſſioned cruiſers of a belligerent nation; a right to be exerciſed with as little harſhneſs and vexation as poſſible, but ſtill a right undoubted, and acknowledged even by Hubner. If free ſhips did make free goods, how is it to be known that they are free ſhips ſave by examination?

Heineccius appears to me to be clearly of this opinion, when he ſays, after ſtating the preſumptions of fraudulent and contraband cargo, from falſe papers and ſpoliation, "Accedunt tamen "aliæ præſumptiones, in quibus neſcio an primum "ſibi locum vindicent ſigna mercatorum in ciſtis, "quas marcas appellant (128)." The marks, therefore, on the bales of goods form a violent preſumption. How are theſe marks to be examined, but by going below deck and examining the cargo?

The conſequence of reſiſting ſuch a ſearch is the confiſcation of the property withheld from viſitation. It is a wild conceit, ſaith the ſame great judge ſo often mentioned, that whenever force is uſed, it may be lawfully reſiſted; a lawful force cannot lawfully be reſiſted. It is a principle of the civil law, on which great part of the law of nations is founded, that reſiſtance to the ſearch we have deſcribed is juſtly followed by confiſcation. It is a principle

(128) Heineccius De Nav. Ob. Vet. Mer. Vec. Comm. ſec. 11.

adopted by all modern nations—by France, in her ordinances of 1681—by Spain, in thoſe of 1718—and by the orders of council in Britain, in 1664. And I have already given the words of Vattel, expreſsly approving while he ſtates the univerſal modern practice.

One matter of controverſy however remains, whether merchant veſſels under convoy of a king's ſhip, and the protection of their ſovereign's naval flag, are exempted from ſearch; for this exemption the northern powers, and their literary champion Schlegel, have ſtrenuouſly contended; and Mr. De Martens, with his uſual facility, has admitted their clamorous aſſertion as a dogma.

Theſe innovating pretenſions were alſo expoſed with infinite force by the court which preſided in the caſe of the Swediſh convoy, in the year 1799, and as it would be an idle and vain attempt in me to try to ſtate the opinion there held in a more expreſſive manner than that of the language of the learned judge, and would be only weakening its force, I hope it may be permitted to me upon this, as upon other occaſions, to uſe his very words as reported(129). The authority, ſays he, of the ſovereign of a neutral country, interpoſed in any manner of mere force, cannot *legally* vary the rights of a lawfully commiſſioned belligerent cruiſer. Two ſovereigns

(129) By Dr. Robinſon, 1 vol. p. 340. caſe of the Maria, Paulſen, maſter.

may unqueſtionably agree if they think fit (as in ſome late inſtances has been agreed) (130) by ſpecial covenant, that the preſence of one of their armed ſhips, along with their merchant ſhips, ſhall be mutually underſtood to imply, that nothing is to be found in that convoy of merchant ſhips inconſiſtent with amity or neutrality: and if they conſent to accept that pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But ſurely no ſovereign can legally compel the acceptance of ſuch a ſecurity by mere force. The only ſecurity known to the law of nations, independent of all ſpecial covenant, is the right of perſonal viſitation and ſearch, to be exerciſed by thoſe who have the intereſt in making it. As to inſinuations, that it might poſſibly be well if ſuch a ſecurity were accepted, it is not neceſſary to deſcant upon ſuch unauthorized ſpeculations. The law and practice of nations give them no ſort of countenance.

If I might be permitted to add any idea to the ſentiments of that great civilian, who may be conſidered in our days, as it were, the ſteady oracle of maritime juriſprudence, amidſt the wild ſpeculations of naval Europe, I would aſk a diſtinct explanation of the meaning intended to be conveyed by the attendant flag of a neutral State accompanying a fleet of merchantmen? Doth it

(130) Between America and Holland in 1782.

purport that the captain of the convoying man of war has previouſly examined all the cargo under his protection? This is not his duty. Doth it mean to certify that the exported cargo hath been accurately ſcrutinized by revenue officers? This is not the fact, and if it were ſo, how doth it judicially appear to the captain of the convoying frigate, or how is he authorized to re-certify it? Laſtly, doth it purport that the State will exert its power, however lawleſs and unjuſtifiable, to protect its flag, however inſolent? The intention of ſuch abſurd defiance of juſtice cannot be ſuppoſed (131).

I cannot do ſo much juſtice to this argument, as by putting it in the very words of a moſt eminent writer on theſe ſubjects, the Earl of Liverpool, who ſays, if no examination is permitted of mercantile ſhips ſailing under convoy,

(131) The miniſter, in a late ſpeech on the ſtate of the nation, March 1801, inſiſted on moſt of the points hitherto mentioned. 1ſt. He denied that free ſhips make free goods, on the ground both of the general law of nations, and of particular treaties. 2dly. Inſiſted that all articles applicable to the uſe of war, were contraband. 3dly. That if blockading ſhips, though not cloſe to the place, were ſo near that a ſhip could not enter without riſk of being captured, it was ſufficient blockade. 4thly. He denied the right of neutral nations to carry on any trade which they were not permitted to do before the war. 5thly. He denied the right of neutrals to protect their merchant veſſels from viſitation by granting eſcorts.

all the ſtipulations in ſubſiſting treaties, which authorize the detention and capture of contraband articles, would thereby be rendered nugatory: and from henceforth every belligerent power muſt reſt wholly on the good faith of the officers of a neutral government, who have *no ſufficient intereſt* in detecting frauds; and who, on the contrary, may have an intereſt to protect, and even encourage tranſactions the moſt injurious to the belligerent; it is certain, that if this doctrine be admitted, the ſmalleſt State may lend its flag, and by hoiſting it on board a cutter or ſloop, protect any number of ſhips under its convoy, from the whole naval power of Britain (132).

The general rules of the law of nations which have been given, may, by mutual agreements between nations, be varied, or departed from; in which caſe the law of nations only governs ſo far as it is not derogated from by the treaty.

Thus by the law of nations, where two powers are at war, all ſhips are liable to be ſtopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a leſs degree of ſearch, on the faith of producing ſolemn paſſports, and formal evidences of property duly atteſted (133).

(132) Preface to his new edition of the Diſcourſe, &c. printed 1801.

(133) This is the caſe with reſpect to Ruſſia, by the late treaty, given in the appendix.

Particular treaties too have inverted the law of nations, and by agreement declared the goods of a friend, on board the ſhip of an enemy, to be prize; and the goods of an enemy, on board the ſhip of a friend, to be free.

So likewiſe, by particular treaties, ſome goods reputed contraband by the law of nations, are declared to be free.

Of the Proofs of Enemies' Property.

The right of ſearch being eſtabliſhed, our next conſideration is, what are the moſt rational and ſatisfactory proofs of the juſtice of detention? It is true, that they cannot be brought to any exact formula, (which ſhews the abſurdity of limiting the ſearchers to a preciſe definite conduct, they acting at their own riſk) but yet there are ſome uſual marks of fraud, and indications of hoſtile property, worthy of remark.

Such are, the carrying falſe or colourable papers, or double ſets of papers by way of deceit,—if proper ſhips papers be not on board,—if the maſter and officers (134), being examined in præpatorio, groſsly prevaricate,—if there be ſpoliation and ſhip's papers thrown overboard,—if the maſter and crew cannot tell whether the ſhip or cargo be the property of a friend or an enemy.

(134) See the Anſwer to the Expoſition Des Motifs.

The ſuppreſſion, or ſpoliation of papers, is always conſidered as a proof of *mala fides*, and where it appears, it is the univerſal rule to preſume the worſt againſt thoſe who are convicted of it, nor can it be explained away by ſaying they were private letters.

Much alſo may be collected from the nature of the crew, and knowing to what nation they belong, as alſo from the national character and *domicile* of the maſter, which word domicile, though familiar to the civil law, being, as Sir L. Jenkins obſerves, little underſtood, it is neceſſary here to dwell a little upon its explanation.

The *Domicile* (135) of any man is the place where he reſides, with an intention of always ſtaying there. He who ſtops for a time, however long, in any place, for the management of his affairs, has a ſimple habitation there, but no domicile. An ambaſſador has not his domicile in the court where he reſides. Domicile is either *natural* and original, or accidental and *acquired*. The firſt given by birth, where the father had his,—the other acquired where we ſettle by our own choice. To this the Imperialiſts add a third, the *common*, or domicile of the empire.

The domicile of origin or birth is immutable. No man can get rid of his allegiance by changing his habitation. The domicile of reſidence is

(135) See Vattell, book 1. ch. 19. ſec. 218; and Gail, lib. 2. Obſervatio 36.

mutable at pleaſure, and yet it produces effects which the other doth not; for the forum of any man by reaſon of domicile, by the law of nations is in the place where he is born only, if he be there found; but in the place of his known and acknowleged reſidence, whether he be found there or not (136). No man can have two acquired, any more than two original, domiciles (137).

The force of the word may alſo be explained by examples. Nothing can be more cogent, ſays a reporter of our own, to denominate a man of a country, than his being a burgher (138), and taking an oath of allegiance.

A man being a burgher, and paying ſcot and lot, and being ſubject in his body and goods, ſays Sir L. Jenkins, makes a domicile, though he have a houſe in another place, and was born in a third (139).

Time is of great efficacy in fixing domicile (140), and ſix years reſidence in a country has been conſidered as conſtituting domicile (141). Traffic alſo may ſtamp a national character on an individual, independent of that character which mere perſonal reſidence may give him: thus if a perſon enters into a houſe of trade in an enemy's

(136) See Gail, lib. 2. Obſerv. 36.
(137) Sir L. Jenkins, 2. vol. 783.
(138) Comyns, 689. (139) 2d vol. 789.
(140) 2 Rob. 325. (141) Ibid. 342.

country, in time of war, or continues ſuch a connection during the war, he ſhall not protect himſelf by mere reſidence in a neutral country. A ſingle man, maſter of a ſhip, who has eſtabliſhed no domicile by family connections, and in his own perſon is employed conſtantly for ſeveral years in the veſſels of a country not that of his birth, in their trade, has been conſidered as diveſted of his national character. A nominal reſidence, not taken up honeſtly with intention of making the place really that of habitation, is plainly a mere ſubterfuge. Mariners are characteriſed by the country in whoſe ſervice they are employed. Veſſels have been ruled to derive their national character ſometimes from the reſidence of the owner; ſometimes from the paſs under which they ſail; ſometimes from their employment and courſe of traffic. But after all, we muſt always keep in recollection the words of Sir William Scott, who ſays (142), *domicile* is a queſtion of great difficulty, depending on a great variety of circumſtances, hardly capable of being defined by any general preciſe rules, and the difficulty increaſed by the variety of local ſituations in which the ſame individual is found at no great diſtance of time, in conſequence of the preſent active ſpirit of commerce, and from the extended circulation by which the ſame tranſaction communicates with different countries.

(142) 2 Rob. 322.

The national character of the veſſel is prima facie determined by the national character of the owner, but circumſtances in the conduct of the veſſel itſelf, may lead to a different concluſion. Thus, if ſhe is navigating under the paſs of a foreign country, ſhe is conſidered as bearing the national character of that nation under whoſe paſs ſhe ſails: and in like manner, if a veſſel purchaſed in the enemies country, is by conſtant and habitual occupation, continually employed in the trade of that country, and this evidently on account of the exiſting war, it is to be deemed a ſhip of the country in whoſe trade it is ſo employed (143).

Of Competent Courts of Prize.

The anſwer to the Expoſition Des Motifs, contents itſelf with ſaying, that every crown has a right to erect admiralty courts for the trial of prizes taken by virtue of their commiſſions, but none has a right to try the prizes taken by another, or to reverſe the ſentences given by another's tribunal. The only regular method of rectifying their errors, is by appeal to the ſuperior court. That this is the clear law of nations, and by this method prizes have always immemorially been determined in every other maritime country as well as England; and no injury is done to the

(143) 1 Robinſon's Reports, p. 13.

party, for the matter is tried not by the municipal law of the country, but as it would at his own domicile, according to the law of nations and particular treaties; according to the general law of nations, modified by the treaties between his nation and ours. Any other method of trial would be manifeſtly unjuſt, abſurd, and impracticable.

This famous anſwer doth not ſay why it is the eſtabliſhed method, nor give proofs and authorities to ſhew that it is the clear law of nations. For theſe I conceive we muſt look into the numerous treatiſes of modern Juriſts (144), as well as the dicta of the the civil law *de foro competenti*, and *Quomodo quis forum ſortiatur*; and from thence we find that the natural and original forum of every man was in the place of his domicile; but if he contracted or offended abroad, and was at any time found in the place that witneſſed his contract or his crime, he was there convenable: above all, if his contract or his delinquency affected his property or *res*, the trial of that property took place where that property actually was. Thus, though the eccleſiaſtics warmly urged the plea of *actor ſequitur forum rei*, to ſecure to themſelves, in all caſes, the privelege of an eccleſiaſtical tribunal, yet, in real actions, they were convened before

(144) See, amongſt others, Gail, lib. 1, 37. and lib. 2, 36, and the mixed obſervations of Bynkerſhoek in his Eſſay De Foro Competenti Legatorum.

the lay judge; and thus, as Huberus has obſerved by the cuſtom of modern Europe, in countries and courts where the proceedings are *in rem*, if the creditor finds in his own country any property of his foreign debtor, he may lay hold of it, and bring his claim to it before his own tribunal; a practice which gave riſe to the cuſtom of *foreign attachment* in the city of London.

On both theſe grounds it is plain, that the legality of captures as prize, is properly cognizable in the courts of the captor. There the alleged delinquent is found, and there the thing captured is brought (145).

When it is ſaid that a pirate may be puniſhed in any country where he is found, it is but the application of a general principle; ſo may any offender; and ſo a congreſs of ambaſſadors determined, as to perſons pretending to act under letters of repriſal after their revocation, who are ſaid by Woodeſon and others (though I do not ſee why) not to be pirates.

Thus far of the proper court of prize as between belligerents. The utter incompetency of a neutral

(145) On the ſame principle Sir L. Jenkins mentions that *renvoy* of a criminal is not now known among princes; and Bynkerſhoek, that a foreigner who has injured one of our countrymen, and is at any time after found here, may here be puniſhed; and mentions, though doubtingly, like inſtances where the injury has been done by one foreigner to another. See. 2. Sir L. Jenkins, 714; and Bynkerſhoek, de predatoria privata. The caſe in Sir L. Jenkins decides the queſtion where both are foreigners.

court to try their prize controverſies, the hoſtility of attempting to do ſo, or of ſuffering the belligerent to hold his courts in the neutral country, has been already ſhewn.

Of Repriſals.

The right of repriſals(146), a barbarous word, originally means a right to ſeize upon things and perſons, given to individuals in conſequence of injuries received, when another may be taken inſtead of the offender, and another's property inſtead of his, though no actual, formal, or general war commenced.

The power of repriſals is alſo frequently granted after war commenced to private armed ſhips, not in the actual pay or immediate ſervice of the ſovereign. They are a mode of reparation authorized by the law of nations, when the ſubjects of one State have been injured by thoſe of another, and juſtice has been ſolemnly called for and denied by the other; on which the ſovereign of the complainants iſſues to them authority to ſeize the bodies and effects of the ſubjects of the other State, in order to enforce ſatisfaction. It was ſometimes called Pignoratio and Androlepſia, in imitation of the Athenian Androlepſia, a law

(146) Repræſaliæ barbaro vocabulo, dicuntur pignoratitiones rerum & perſonarum, quando unus pro alio, & res unius pro re alterius apprehendatur. Gail, De Pignoratioribus Obſervatio 2, a.

authorizing to ſeize the three next citizens of that place to which a murtherer had fled.

It has been much diſputed whether they are tolerated by the divine and by the canon law, and the authority of St. Auguſtine has been quoted to ſhew that we have a right to make war upon nations who deny juſtice to us, but which appears too general an expreſſion to apply to repriſals in their uſual confined meaning. They are ſaid to have been derived from the old cuſtom at Rome, of taking ſatisfaction for injuries out of enemies property, if it was refuſed after due admonition by the *feciales*. Yet the Roman emperors diſcountenanced repriſals, for a plain reaſon, becauſe they naturally lead to lawleſs violence, and the production of general war.

The juſtice of repriſals is thus vindicated by Grotius (147); "Naturaliter ex facto alieno nemo "tenetur niſi hæres. Jure tamen gentium introduc- "tum ut pro debito imperantis teneantur res & "actus ſubditorum. Aliter impunitas, quia bona "imperantium ſæpe non tam facile poſſunt in ma- "nus venire, quam privatorum qui plures ſunt."

This plain reaſoning, acknowleged by all the world to be valid, without a diſſentient voice before our paradoxical times, may ſerve as an anſwer to that wonderful poſition, that war means military war and commercial peace.

(147) Grotius, book 3. ch. 2.

Let me add, if it were neceſſary, the authority of Vattel, who ſays, *all* the ſubjects of ſtates at war are reciprocally enemies, book 3. ſec. 70; and Barbeyrac agrees, that private perſons are anſwerable with regard to ſtrangers, for what the ſociety or governing powers do or owe (148).

But Heineccius goes further: "Grotius," ſays he, "thinks that repriſals cannot be juſtified by the law "of *nature*, but I think they may, and that we "need not have recourſe to the law of nations. "*Nam respublica ratione alterius reipublicæ conſide-* "*ratur ut una perſona moralis*; one State with re- "ſpect to another is conſidered as a ſingle moral "individual, and if the ſovereign will not pay, the "nation becomes the debtor, who cannot complain "of injury, for when they ſubmitted their wills "to that of their ſovereign, they became ſureties "for his actions, and they have redreſs even againſt "their own government (149)."

Repriſals are ſpoken of in a ſtatute of Edward III. (150) as a known and eſtabliſhed uſage, and the method of proceeding is ſpecified in a ſtatute of Henry V. (151); viz. upon complaint of the injured party upon oath, the Lord Privy Seal is to make out letters of requeſt to be preferred, not

(148) In Grotium. de Jur. B. & P. book 3. ch. 2.

(149) Prælectiones in Grotium. I tranſlate this from the firſt volume of the Geneva edition of Heineccius, in eleven volumes quarto.

(150) 27 Edward III. ſtat. 2 cap. 17.

(151) 4 Hen. V. ch. 7.

only to the aggreſſor, but to his ſovereign, and if juſtice be denied, or delayed, the Lord Chancellor is empowered and required to iſſue letters of marque (152) and repriſal under the great ſeal.

Repriſals are of two kinds, ordinary and extraordinary, and the ordinary either within the realm or without, granted when any Engliſh merchants have ſuffered by merchants foreigners in their perſons or goods. If the merchants ſtrangers, or their goods are in England, a writ may iſſue out of chancery to arreſt them; if not, letters patent may paſs as above-mentioned, under the great ſeal, which veſt a national debt in the grantee, to be ſatisfied in ſuch manner, and by ſuch means, as ſuch letters patent direct, out of the goods and eſtates of that prince's ſubjects who refuſed or illegally delayed juſtice. Of theſe ordinary letters of repriſal, precedents may be ſeen in the collection of the ſea laws, and in Beawes' Lex Mercatoria. Extraordinary repriſals were authorized by letters of marque granted by the ſecretaries of ſtate with the approbation of the king in council, but both ſeem in practice to be entirely ſuperſeded by the letters of marque and commiſſions to privateers, granted by the lords of admiralty, by virtue of the prize acts; and indeed the ancient method of empowering the

(152) This word marque, or marche, is uſed becauſe they give power to paſs the marches or boundaries of the enemy.

individual to redreſs his own private injury by making war, muſt obviouſly have been fraught with infinite inconveniences.

Letters of repriſal may be revoked either expreſsly or impliedly, by the ceſſation of hoſtilities between two countries. No doubt ever was entertained of this as to general letters of marque, not given to the individual for the reparation of his own private injury; but a moſt ſingular controverſy did occur on that ſubject before Lord Chancellor Nottingham, the executor of a grantee of repriſals, inſiſting upon his right, even againſt his majeſty's will (153).

Of Privateers.

Since privateers are commiſſioned by the admiralty, thoſe commiſſions revocable by the ſame authority, and their conduct in many reſpects examinable and puniſhable in that court, it is not foreign from our purpoſe to give ſome account of them, and of the regulations concerning them. The diſcuſſion, ſays Bynkerſhoek, appertains to that of public law, becauſe they cannot act without public authority, and becauſe they often occaſion controverſies which diſturb the public weal (154).

(153) 1 Vernon, 54, 55. It is obſervable, that in this caſe, chancery is ſaid to have admiral juriſdiction.

(154) See Bynkerſhoek, De Prædatoria privata. Mr. De Martens of privateers. Beawes' Lex Mercatoria, head capias, &c.

In the earlier times of Rome, no man but the public ſoldier of the State could, *de jure*, kill the public enemy (155). Afterwards private ſocieties were allowed to be formed for the purpoſes of annoying the foe (156). In modern times, for ſeveral ages paſt, States at war have not only exerted the public power, but have gladly embraced the aſſiſtance of private adventurers.

Thus individuals in the United Provinces, in their great conteſt for independence againſt Spain, fitted out numberleſs private ſhips of war, which at firſt received pay and reward from the State, but afterwards were contented with their chance of plunder. Albericus Gentilis calls them pirates; a word formerly of ambiguous meaning, and not always uſed in a bad ſenſe; but if taken in its uſual acceptation, abſurdly applied to any power commiſſioned and authoriſed by the State and committed to its own ſubjects. Since that period, they have been in uſe with every maritime nation of Europe, every proper precaution being firſt taken to prevent abuſes by obliging them to give ſecurity.

The arguments for and againſt their uſe may be reduced to the following: It is ſaid, that it is a practice liable to great diſorders.—That ferocious men will not eaſily be confined to lawful ſpoil, and that in fact their abuſes have been often intolerable, and have often involved na-

(155) Cicero de Officiis, lib. 1. cap. 36.
(156) Ff. 4. De Collegiis & Corporibus.

tions in war; and the authority of Lord Clarendon is quoted, who warmly inveighs againſt their predatory conduct in his time, expoſing the inhumanity of the crews, and the miſchief done to his majeſty's ſervice by encouraging deſertion, from the hopes of partaking in a more profitable warfare. On the other hand it is ſaid, that all the ſubjects of hoſtile States are reciprocally enemies; that it is meritorious in every one of them to ſerve the State; that this is a method of annoyance particularly diſtreſſing to the enemy, and that every care has been taken to guard againſt abuſes, which in later times have not been very frequent (157).

The numerous precautions taken to prevent abuſes have indeed very much put an end to the priſtine invectives againſt privateering. At the onſet ſecurity is required, to be approved of by the lords of the admiralty or admiralty board, by the prize acts; and by the ſame laws, they have no property in any prize, till it be adjudged lawful prize by a competent court of admiralty, and their commiſſions may be revoked for miſbehaviour. Beſides, by the ſame acts, ſhips taken by any colluſion by a privateer ſhall be judged good prize to his majeſty (158); and offences on board any privateer are cognizable as on board ſhips of

(157) By the Ruſſian treaty, made in the preſent year, the right of ſearch is not permitted to privateers.

(158) The prize acts are enumerated elſewhere.

war in the king's ſervice. The ſize of the veſſels to be employed as privateers is alſo often aſcertained by parliament, to prevent any wretched miſerable kind of ſubaltern piratical war (159); and if they embezzle either captured goods, or contraband taken out of a neutral veſſel, they forfeit treble value; and if they ranſom neutral ſhips, inſtead of bringing them into port to try the juſtice of detention, they are guilty of piracy (160). They are beſides obliged, before they ſail, to deliver in a liſt of their men to the chief officer of the cuſtoms; and though in ſome wars they have been allowed to have foreign ſeamen, one-fourth of the crew was always Britiſh.

Of the Rights of Neutrals.

The rights of neutrals may be conſidered, as far as regarded by the maritime code, in relation to the protection of their trade, and to the ſecurity of their own coaſts. It has already been admitted that their commerce is to be left as extenſive as it was before the war; that they are not to be prevented from importing for their own uſe, or carrying on their *accuſtomed* trade, or exporting their commodities, not contraband, to places not block-

(159) See 32 Geo. II. ch. 25.

(160) 32 Geo. II. ch. 25. This act ſhews the extreme attention of England, not to do injury to the neutral powers.

aded; that they may even carry enemies' goods, without being liable to confiſcation of the ſhip, nay, with allowance of freight and expences, if it be not in the enemies' coaſting or colonial trade; and that where they carry articles of their own native produce, though contraband, the belligerent powers only claim a right of pre-emption.

On this Right of Pre-emption

Some remarks are neceſſary. It means a right of purchaſe, upon reaſonable compenſation to the individual whoſe property is thus diverted; but to this favourable rule the captured is not entitled, if there be not a perfect *bonâ fides* upon his part. As to him, therefore, it is rather an indulgence than a right, founded on this idea, that it is a harſh exerciſe of a belligerent right to prohibit the carriage of theſe articles, which conſtitute ſo conſiderable a part of his country's native produce and ordinary commerce (161).

On the ſide of the belligerent this claim doth not go beyond the caſe of cargoes avowedly bound to the enemies' ports, or ſuſpected on juſt grounds to have a concealed deſtination of that kind: and on the ſide of the neutral, the ſame exact compenſation is not to be expected which he might have demanded from the enemy in his own port;

(161) See 1 Robinſon, p. 241.

e. g. the enemy might be diſtreſſed by famine, but intercepted proviſions are not to be paid for at the price of diſtreſs which they would give (162).

The right of taking poſſeſſion of ſuch native produce, and even of proviſions, is no peculiar or modern claim. It was the practice of the ancient maritime ſtates of Europe to confiſcate them entirely; and this cuſtom was retained by ſome of them until within the century laſt paſt. The mitigated practice of pre-emption has exiſted only in modern times.

The right of pre-emption of veſſels and ſtores captured, exiſting in the commiſſioners of the navy and maſter-general of the ordnance by the prize acts is of a totally different nature, and relates merely to the captor.

The ſecurity of neutral ſhores, and their freedom from violation by hoſtile violence, together with the extent of the legal protection and aid which they can afford to an enemy, remain to be conſidered.

All writers on public law, without exception, agree that force is not to be committed in a neutral port or territory, or the immediate and cloſe vicinity thereof; and that whoever is guilty of it, commits an outrage againſt the neutral power,

(162) See 2 Robinſon, p. 182.

which is bound to ſee reſtored any captures there made (163).

Beſides the inſult to the neutral, and the protection he owes his friend, another objection to a contrary practice is obvious—the danger which would occur to the peaceable and innocent inhabitants of the neutral country from the emiſſion of hoſtile weapons, and the conflict of arms near their ſhores and on their coaſts. But if the enemy has been attacked in the open ſea, he may be purſued to the neutral ſhore, but not into the very harbours, nor ſo as to endanger the neutral ſubjects; and it is ſaid, that if the ſhips of the purſuers are fired upon by the forts of the neutral, in ſuch a caſe they ought not to return the fire, but rather relinquiſh the chace.

But while the neutral ports are thus ſecured from inſult, it is the duty of that neutral power not to ſuffer thoſe ports to become ſites for hoſtile equipment againſt the belligerent, nor to ſuffer courts to exiſt in its country, aſſuming powers of condemning captured ſhips not yet brought into the hoſtile territory, nor to aid one power at war againſt the other in any ſuch manner; for then it

(163) See Bynkerſhoek, cap. 8. Quæs. Pub. Jur. *An hoſtem liceat aggredi vel perſequi in amici territorio*, and the examples there put. He juſtly condemns, on theſe principles, Van Tromp's attack on the Spaniſh fleet in the Downs, and that of the Engliſh on the Dutch Eaſt India ſhips at Bergen, in Norway, in 1665.

would evidently ceaſe to be neutral, and the approach to its ſhores be as dangerous as to thoſe of the open and avowed foe.

Such have been the principles maintained by Britain, founded in reaſon, conformable to the law of nations, and conſonant to the dictates of nature. They muſt be ever true, and therefore ever juſt, even if this country ſhould at any time, or in any inſtance, think it politic to relax or recede from them, which in the opinion of the ableſt men it never can, without eſſential detriment to its intereſts, diminution of its glory, and abatement of its proſperity, ſecurity, and power.

Since the preceding part of this chapter, the ſudden and joyful tidings of peace have burſt upon us. The knowledge, therefore, therein comprized, may appear for the inſtant of leſs utility; but it muſt be recollected, that whatever may be our love or our hopes of peace, wars in the nature of things muſt recur, and this rudimental information muſt for ever be neceſſary. Happy ſhould we be if eternal concord amongſt nations rendered it unneceſſary to extend our views beyond thoſe civil and commercial regulations which employ

the attention of the inſtance court, and which were diſcuſſed in our preceding chapters (164).

(164) The queſtion of prize doth not immediately ceaſe with the reſtoration of peace. All prize caſes then depending muſt of courſe be decided: but beſides, the royal proclamation always reſerves a time within which captures made in certain regions, though after preliminaries ſigned, ſhall be valid. Thus, in the laſt proclamation of 12th October, 1801, all captures in the Britiſh Channel and North Seas after twelve days from the ſigning the preliminaries, were to be reſtored—after one month, if made any where from ſaid places to the Canary Iſlands—two months from thence to the equator—five months in all other parts of the globe.

CHAPTER VIII.

OF A ROMAN SUIT, OR ITS CONDUCT BY THE ANCIENT CIVIL LAW.

THE hiſtory and analyſis of a Roman ſuit is intereſting, as it may in ſome inſtances elucidate and explain points of modern practice not derivable from any principles of modern laws, and in fact without ſome knowlege of it, that of our modern eccleſiaſtical courts, of our courts of equity, but moſt particularly of the court of admiralty, is unintelligible: thus in the eccleſiaſtical courts it does not appear why a proctor doth not become *dominus litis*, and cannot appoint a ſubſtitute until after conteſtation of ſuit, unleſs we are acquainted with the principle of the old Roman law, that no man could act or appear for another in a court of juſtice (1), and know that the fiction of the *dominium litis* was introduced to get rid of this moſt inconvenient maxim. And in courts of equity, the ſtructure of a bill, and its repeating the ſame ſtory twice, firſt in the ſhape of aſſertion, and then in the form of interrogation, will appear unaccountable to him, who is unacquainted with the old canon law practice as to

(1) Generaliſſima erat regula juris, per extraneam perſonam nil adquiri poſſe: hinc nemo pro alio agere poterat in judiciis. Vid. Heinec. Antiq. lib. 4. tit. 10. ſec. 2.

the poſitions and the articles (2). Nor will it appear much more than an arbitrary diſtinction when a man is told, that he cannot in ſtrict practice after iſſue joined amend his bill, though he may file a ſupplemental one (3), although all the proceedings are carried on before one and the ſame judge, till he knows that the bill in chancery is derived from the prætors' forum, where, after conteſtation of ſuit, the prætor could not amend, becauſe the cauſe was gone from him to a different tribunal, viz. to the *decemviri lit. jud.* and the *judices*, and he had nothing before him to amend; nor could *they* amend or alter, any more than a judge or jury at niſi prius could alter the iſſue ſent to them to be tried. I mention theſe only as the firſt inſtances that occur.

In the eccleſiaſtical courts, however, the influence of the civil is overpowered by that of the canon law; and in courts of equity its directions, though uſeful, are by no means predominant; but the court of admiralty, as the greateſt of modern judges, Lord Hardwicke, has obſerved, proceeds entirely by the rules of the civil

(2) This ſhall be preſently explained. It is remarkable that this ſuperfluous tautology has been corrected in the eccleſiaſtical courts, and not in the courts of equity: for in the former, the perſonal anſwer of the party is demanded to the aſſertions and charges of his adverſary, without putting theſe into the form of interrogation.

(3) See Howard's Equity Side of Exchequer, vol. 1. p. 269. This is now reduced to a more rational principle, that he cannot amend after publication. See Mitford, p. 53. and 258.

law, except in caſes omitted, and therefore in that court a knowledge of the ancient practice of that law is indiſpenſably neceſſary, and muſt be had previouſly to the ſtudy of the modern practice of that court.

The authors from whom this knowledge muſt be derived, give us little inſight into the written pleadings and proceedings of antiquity, and uſually ſpeak as if all things were tranſacted *ore tenus*, in little ſhort formulæ, ſuch as took place amongſt our anceſtors in earlier times: on ſuch ſcanty information, therefore, we muſt build the beſt ſuperſtructure we can.

The ſuit began by ſummoning or arreſting the perſon of the defendant, and bringing him before the court; this the plaintiff did by his own private authority, without any writ (4), provided he found the defendant abroad, for every man's houſe was his caſtle, and he could not be taken within his own door. If he lay hid within his own houſe, inſtead of a *latitat*, a *public edict* was put up upon his door demanding his appearance, which being thrice repeated, if not obeyed in the third inſtance, a decree went againſt his goods and property (5).

When the plaintiff made his caption of the defendant, he called the perſons preſent to wit-

(4) This was the caſe at leaſt, until after the age of Pliny, vid. Pliny's Panegyric, cap. 36; but afterwards, in the days of Paulus and Ulpian, an authority from ſome court was required to arreſt or ſummon any perſon.

(5) Like our diſtreſs infinite of old.

neſs the fact, which was ſtiled *anteſtari*, unleſs he made it up with his adverſary on the way (6). The impugnant appearing before the prætor, the plaintiff choſe his form of action, and applied to the prætor to permit him to proceed in that form, which was called *poſtulare actionem*, and then the plaintiff, or *actor dabat actionem*, gave notice to the defendant of its nature and cauſe, and the defendant gave bail (7), *vadis vadimonium*, to appear (8) *die perendino*, the day after the morrow.

This rude and barbarous method of dragging the debtor *obtorto collo* before the magiſtrate, by the mere authority of the party, unaſſiſted by any legal officer, though, according to Huberus, oppoſition was conſidered as a contempt of the court, was, as Heineccius ſhews by quotations from Aulus Gelius, often attended with the greateſt cruelty, and exiſted, according to the ſame author, until after the time of Pliny: but

(6) Horace Satir. 9. *Licet anteſtari?*

(7) Which may be compared to the bail to the ſheriff, as the pactum or tranſactio, the making it up on the way *of the ſcripture*, may (and is by Blackſtone) to an imparlance. Mr. Reeves and Mr. Cruiſe ſay, it reminds them of the *fine*, in the early parts of our hiſtory; the leave *interloqui* in interrogatory actions was more like an imparlance.

(8) Our period is leſs limited, the *quarto die poſt*, which I have heard in legal declamations aſcribed to the ſtupidneſs of our anceſtors, who would not be obliged to appear directly, as if ſome ſuch delay was not known to all laws.

before Juſtinian's days, a more rational one was introduced, and the defendant was ſummoned by the apparitors or officers of the court. From this laſt period, therefore, corporal arreſt, except for crimes, ſeems to have been at an end, and the only object was to force an appearance as in our old common law, by diſtreſs infinite, and therefore Judge Blackſtone, ſpeaking of our old proceſs by ſummons and diſtreſs infinite, ſays, here by the common, as well as the civil law, ended all proceſs for injuries unaccompanied with force. The defendant was to be cited thrice, by three *ſimple* citations, with an interval of at leaſt ten days between each citation, and then a *peremptory* iſſued (9). And the defendant was not truly contumacious till after the peremptory was

(9) Ad peremptorium edictum hoc ordine venitur, " ut " primo quis petat poſt abſentiam adverſarii edictum *primum*, mox *alterum* per intervallum non minus decem " dierum, et *tertium*, quibus propoſitis tunc *peremptorium* " impetret. In peremptorio autem comminatur is, qui " edictum dedit, etiam abſente diverſa parte cogniturum " ſe, ad pronunciaturum. Nonnumquam autem hoc edic- " tum poſt tot numero edicta quot præceſſerint datur. Non- " numquam poſt unum vel alterum; nonnumquam ſtatim " quod appellatur *unum pro omnibus*. hoc autem æſtimare " oportet eum qui jus dixit, & pro conditione cauſæ vel " temporis, ordinem edictorum vel compendium moderare." Dig. lib. 5. tit. 1. from 68 to 72 incluſive. See alſo Heineccius, on the Pandects, part 1. ſec. 281. and his Antiq. vol. 2. p. 304. and Ayliffe's Parergon Juris Canonici, p. 176.

ſerved (10); or otherwiſe one only citation iſſued, and that a peremptory to ſummon the party to appear at a diſtance of time equal to what three ſimple citations ſhould contain, and if he was contumacious a *primum decretum* iſſued (11), in real actions to take poſſeſſion of his goods, and in perſonal to hold them in a ſort of cuſtody, together with the owner; and in perſonal actions there was alſo a *ſecundum decretum* at the end of the year, to give a jus uſucapiendi & præſcribendi; in both caſes, if the defendant came in within the year, purged his contempts, and gave ſecurity to abide the ſuit, and paid the coſts, poſſeſſion was reſtored to him, but not afterwards.

The following clear account of the primum & ſecundum decretum is taken from Duraud.

(10) *Vere contumax*, ſays Gothofred in his note on the 5th book Pandects 70. In our eccleſiaſtical courts, as in the canon law, the firſt citation is peremptory, ſo far as to make the party abſenting himſelf contumacious, but he cannot be excommunicated till after three notices, as will be ſeen hereafter, but they are not like the Roman, all originals, or mere repetitions of the original.

(11) From hence the *firſt decree* in the court of admiralty, or proviſionate decree for the poſſeſſion of a ſhip, ſee 1 Ventris, 174. and Moor, 814. as I deduce the *four defaults*, technical terms known to that court, from the number of citations abovementioned; for that court has excluſively followed the civil law, while the eccleſiaſtical have been much affected by the canon.

Primum decretum eſt, proprius juſſus judicis, quo mandat bona alicujus propter ejus contumaciam in pœnam contumaciæ *poſſideri* (12), cum actum eſt actione reali vel perſonali. Spec. lib. 2. De primo decreto.

It went at firſt ad omnia bona; latterly the Authenticks confined it pro rata debiti.

Quandoque interponitur primum decretum, & non ſecundum, ibid.

Per primum decretum habet miſſus, & cuſtodiam & defenſionem rerum, quod dicitur judiciale. Fructus capere, prædium locare poteſt. But there is no ſecundum decretum in the admiralty, for they act in rem.

Secundum decretum eſt ſecundus juſſus judicis, quo jubet bona alicujus propter contumaciam *poſſideri*, quæ prius ex primo decreto *detinebantur*.

Locum habet ſolum in perſonalibus (13). Quia a gens perſonali petit ſibi dari aliquid quod ſuum non eſt. Si igitur non det, utile eſt interponi, ſecundum decretum per quod ſit miſſus dominus vel ſaltem acquirit jus uſucapiendi & præſcribendi. At is qui rei vindicatione agit, non petit rem ſibi dari, ſed eam, ſeu ejus poſſeſſionem ſibi reſtitui, quia dicit ſe dominum rei, unde cum per pri-

(12) He ſhould have added, cuſtodiendi vel detinendi cauſa, for the primum decretum doth not give a firm poſſeſſory right till after a year.

(13) This is the reaſon, as I conceive, why there is no ſecundum decretum in the admiralty.

mum decretum nanciſcatur ejus poſſeſſionem impletur ejus decretum.

In realibus tranſcurſus dum qui habetur loco ſecundi decreti, facit quem verum poſſeſſionem (14).

Item per ſecundum decretum habet creditor, cui res in ſolutum data eſt juſtam cauſam poſſidendi, & præſcribendi ſive debitor fuerit dominus rei poſſeſſæ, ſive non.

Per ſecundum decretum venduntur quandoque bona:

The perſon who obtained a primum decretum, inſtead of being himſelf miſſus in bona, might, on his petition, get the fructus ſequeſtered (15) in the hands of another, as his agent, for his benefit.

The perſon miſſus in bona, by theſe decrees was ſo, not only for his own benefit, but that of all creditors, which bears a ſtriking reſemblance to the uſage in courts of equity, where ſome

(14) Between theſe laſt two paragraphs there ſeems at firſt a contradiction, but they refer to different caſes. The firſt alludes to a plaintiff having a right of property; the other to a lien or hypothecation, where, during the year, cuſtody only is obtained. The lapſe of the year anſwers in the admiralty the purpoſe of the ſecond decretum.

(15) Hence I imagine originated the proceſs of ſequeſtration in chancery, though in the civil law ſequeſtration is uſually applied to putting property in diſpute in the hands of a ſequeſter, like the appointment of a *receiver*.

Lord Bacon, the introducer of ſequeſtrations in chancery, knew the civil law well.

creditors ſeeking an account, others may come in under their decree.

We have hitherto ſuppoſed contumacy—now ſuppoſe the party to appear.

The party appearing at the appointed time, was to give ſecurity or bail to the action, and if he had a right to throw the *onus* upon ſome other perſon, to vouch him or call him in aid, which was termed *laudatio*; and here, as in every other ſtage of the cauſe, *feriæ* the intervention of a holiday, or *dilationes* allowances of time granted by the court upon juſt cauſe, might produce delay.

If the defendant, or reus, appeared at the proper time, but the actor or plaintiff abſented himſelf (16), he was nonſuited. If he did not proſecute his action for a year, then at the end of that time, after three ſeveral ſummons, at the interval of thirty days each, he was nonproſd.

It ſhould ſeem that a citation muſt be iſſued *de novo*, in any and every ſtage of the cauſe when a party abſented himſelf; and hence Heineccius ſays, "Diverſa ab hac in jus vocatione, eſt cita-"tio cujus jus noſtrum meminit; illa enim initio "litis, et ſemel fiebat (17)."

(16) 112 Novell, c. 3.

(17) Heineccius in Pandectas, part 1. De in jus vocando, and hence in the foreign eccleſiaſtical courts, the cauſes being ordinary, no ſentence could paſs, if the party contumaciouſly abſented himſelf, though in the civil courts, where cauſes were ſummary, they might. See the *Practice*

If both parties appeared on the appointed day, each was to give ſecurity *ſtipulatio*, or *ſatiſdatio*; the plaintiff, that he would proſecute his ſuit, and pay the coſts, if he loſt his cauſe (18): The defendant, that he would continue in court, and abide the ſentence of the judge, i. e. bail to the action (19), and at this time alſo (though that

Judiciaria Joannis de Arnone annexed to Maranta's work, and the ſame practice introduced in our eccleſiaſtical courts produced infinite inconvenience, till remedied by the good ſenſe of judges, in the manner that ſhall be mentioned hereafter.

(18) In like manner, ſaith Sir W. Blackſtone, as our law ſtill requires nominal pledges, book 3. comm. ch. 19.

(19) "Much like our ſpecial bail," ſays Sir W. Blackſtone, "but with this difference, that the *fide juſſores* were "there abſolutely bound *judicatum ſolvere*, to ſee the coſts "and condemnation paid at all events, whereas our ſpecial "bail may be diſcharged by ſurrendering the defendant into "cuſtody within the time allowed by law," ibid. Heineccious differs, at leaſt as to later periods, for he ſays, "Novo "jure reus, ſive in rem, ſive perſonali actione caveretur, "nunquam cavebat *judicatum ſolvi*, ſed tantum *judicio* "*ſiſti*.

"Antiq. lib. 4. tit. 11."

Cautions or ſecurities were,

Judicatum ſolvi;
De Judicio ſiſti;
De Ratio.

By the firſt, the ſuitor engaged, if he loſt his cauſe, to pay whatever ſum he ſhould be condemned in by the judge.

was frequently done too immediately after conteſtation of ſuit) the oath of calumny was ſometimes adminiſtered.

Security being given on both ſides, the plaintiff preferred his action; in ruder times, by a certain form of words, to which the defendant was to plead *ore tenus*; in more improved, by filing his libel, to which the defendant having firſt received a copy, and ſubſcribed the time of its reception, anſwered in writing in due time, i. e. at furtheſt within twenty days (20).

The libel having been put in, the defendant either confeſſed the plaintiff's charge, or if he could deny generally its whole truth, he did ſo at

By the ſecond, he gave ſecurity to abide the ſentence. And latterly, alſo to pay a tenth part of the ſum in diſpute, if defeated.

The third, engaged that a principal would confirm the acts of his proctor, or agent.

Cautions with reſpect to the manner in which they were taken, were,

Cautio fide juſſoria, viz. by ſureties;
Pignoratitia, by depoſit;
Juratoria, by oath;
Nude Promiſſoria.

The firſt was the one generally in uſe, and called by way of eminence ſatisdatio, and is the one uſed in the court of admiralty on defendants appearance, in nature of bail, though ſometimes a juratory caution is there admitted.

(20) See Code lib. 3. tit. 9. Novels, 53. ch. 3.

once, i. e. he pleaded the general iſſue, which is the ſtrict and original meaning of conteſting the ſuit or the *litis conteſtatio* (21).—If he could not make

(21) LITIS CONTESTATIO.

This opinion is founded on the following reaſons—

An exception could not make the *litis conteſtatio*; for we are perpetually told, that of exceptions ſome *muſt* be put in before conteſtation of ſuit, others might after, which would be abſurd if they could be identified with it.

An iſſue joined on the truth of an exception, though it is called a conteſtation of ſuit, is properly a conteſtation of the exception or defence of the reus, and not of the plaintiff's ſuit or charge, for *lis* is the charge made by the *plaintiff*. *Litem intendere alicui*, to bring an action againſt ſome one; *in litem jurare*, to ſwear to the truth of his complaint; *litem capitis in aliquem inferre*, to bring againſt one a capital charge, are all expreſſions of Cicero's. Beſides, the common and vulgar trite definition of a *conteſtatio litis* is, that it is *reſponſum libello*; and, as I conceive, for reaſons which I ſhall mention hereafter, that the ancient Roman law knew nothing like ſpecial anſwers in courts of equity, or the perſonal anſwers of the eccleſiaſtical courts; the anſwer could be nothing but a general anſwer—a general confeſſion, or a plea of the general iſſue.

I acknowledge, that in modern times this ſtrictneſs has worn off; and in certain cauſes, e. g. all ſummary ones, no ſtrict conteſtation of ſuit is required: the ſuit is, *as it were*, conteſted, by the next contradictory act after the libel put in that concerns the merits of the cauſe, or to uſe the words of Maranta, "Primus actus qui ſolet immediate fieri poſt "litis conteſtationem, in cauſis in quibus lis conteſtatur "habet vim litis conteſtationis in cauſis in quibus lis non

this denial, he put in an exception, or a defenſive matter.

" conteſtatur;" i. e. as he obſerves, in *all* cauſes in the kingdom of Naples, they being all ſummary, in which *omnia ſubſtantialia judicii ſunt ſublata*—Part 6. de Litis Conteſtatione. And thus Lyndwood ſays, " In ſpeciali inquiſitione " vocabitur is contra quem proceditur, qui ſi veniens reſ- " ponderit, habebitur *pro* conteſtatione."

But ſee whether I am not juſtified by authorities as to the ſtrict and original meaning of theſe terms: " Per re- " ſponſum ad poſitiones;" i. e. by a ſpecial, or what we call a perſonal anſwer, to diſtinguiſh it from the anſwer of the proctor. Non inducitur litis conteſtatio, ſays Gail, Obſerv. 73. N. 7.

" Nequaquam per exceptionem peremptoriam litis con- " teſtatio intelligitur eſſe facta."—Sexti Decretalium, lib. 2. tit. 3.

" Exceptionis peremptoriæ, ſeu defenſionis cujuſlibet " principalis, objectus ante litis conteſtationem, niſi de re " judicata tranſacta vel finita, litis conteſtationem non im- " pedit."—Ibid.

" Super exceptionibus non neceſſe litem conteſtari. Poſt " litem conteſtatam non addi poteſt libelle qualitas."

" Litis conteſtatio fit, per vel negationem, vel per con- " feſſionem, vel per verbem dubitativum; per negationem " quando reus negat *ſimpliciter* narrata per actorem."—Maranta, part 6. de litis conteſtatione.

I think I can borrow aid from Sir Wm. Blackſtone upon this ſubject, vol. III. of his Commentaries, page 296.— " Defence," ſaith he, " in its true legal ſenſe, ſignifies not " a juſtification, protection, or guard, which is now its po- " pular ſignification, but merely an *oppoſing* or *denial* of the

Of the characters of theſe pleadings—little is ſaid. We find in general that the libel ought to

" truth or validity of the complaint. It is the *conteſtatio* " *litis* of the civilians, a *general* aſſertion that the plaintiff " hath no ground of action."

I have been prolix on this ſubject, becauſe it may ſometimes be important. In a remarkable cauſe, the Office *v.* French, tried before myſelf as vicar-general of Kildare, a queſtion ariſing whether additional articles could be put in, the impugnant having anſwered thoſe original, it was, among other arguments againſt ſo doing, inſiſted by very able and learned men, and ſaid, though I thought erroneouſly, to be ſupported by a great living authority, that no addition, alteration, or amendment, could be after conteſtation of ſuit, that the ſuit had been conteſted, and that every *reſponſum libelli*, and even an *exception*, formed a conteſtation of ſuit.

I was of opinion that in this caſe, which was a criminal ſummary proceeding, there could be no litis conteſtatio, in the ſtrict ſenſe of the word; but that, even if there could, an anſwer to articles did not make one, but was only, as Lyndwood ſays above, *pro* conteſtatione—that the rule as to amending or adding being now a mere arbitrary one, no longer founded in reaſon, ſince the *canon law*, a ſtranger to juries, had fixed the ſame judge for matters after as before conteſtation, it ſhould be conſtrued ſtrictly with reference to the ſtrict original meaning of the terms *litis conteſtatio*—and even that admitting this anſwer to be a conteſtation of ſuit, the old rule, which forbade ſubſequent amendment or addition *to the libel* or articles, had nothing whatſoever to ſay to *additional* articles or allegations, for reaſons which ſhall be mentioned preſently.

The litis conteſtation, by which, ſays Mr. Erſkine, a judicial contract is underſtood to be entered into between

contain a *narration* and *concluſion*, to be *ſhort*, and contain nothing ſuperfluous—*clear*, ſo as to avoid all ambiguity—*apt*, i. e. that the prayer for relief ſhould accord with the nature of the grievance, and ſufficiently *certain* as to the quantity, quality, and nature of its ſubject matter.

From the accuracy, which as we ſhall preſently ſee was uſed in *inſcriptiones* or indictments, we may ſuppoſe it was not neglected in theſe declarations.

EXCEPTIONS.

It has been obſerved, that if the defendant could not conteſt the libel generally, i. e. plead the

the litigants, is of ſo much conſequence in the Scotch law, that even an action ariſing ex delicto is thereby perpetuated againſt heirs.—Erſkine's Inſtitutes, ch. 3. ſec. 1. 33.

To conclude, all the commentators, and Lanfranck and other books of practice, ſay that *reſponſum poſitionibus*, or a perſonal anſwer, is not a conteſtation of ſuit; and who ever heard that an anſwer in chancery was a joinder of iſſue?

† In common parlance, denying the truth of the defendant's exception, or indeed wherever parties come to a direct affirmance on one ſide, and denial on the other, is called a conteſtation of ſuit, and is ſufficient to ſatisfy the rule, that in all plenary cauſes there muſt be conteſtation of ſuit, becauſe the defendant by excepting becomes a *quaſi* plaintiff. *Reus excipiens actorem agebat*, ſays Heineccius, in Pandectas. *Qui exceptiones opponit actoris partibus fungitur*, Maſcardus, vol. i. quæſ. 17. 4. *In exceptionibus reum partibus actoris fungi oportere*, Dig. 22. 3. 19.

general iſſue, he muſt put in an *exception* or a *defenſive* matter.

Exceptions were either *peremptory* or *dilatory*, the firſt barring, perempting, or deſtroying the plaintiff's ſuit or cauſe of action; the latter poſtponing or delaying him.

To the former the civilians add the epithet of *perpetual*, to the latter of *temporary*: perhaps not with perfect accuracy, ſince a perpetual bar may ſometimes be pleaded in the ſhape of a dilatory; or, to uſe our own technical phraſe, the ſame plea may ſometimes be pleaded, either in abatement or in bar, e. g. outlawry: and beſides a plea which is only dilatory as to bringing another ſuit, may be perpetual and peremptory as to the preſent.

To explain exceptions, we muſt underſtand that if the defendant could allege any thing by which the action, that in ſtrictneſs of law accrued to the plaintiff, could be excluded, evaded, or eſcaped, on grounds of law or juſtice, though it was not, in ſtrictneſs of ſpeech, taken away, he did it by way of exception: thus if he could *demur*, it was called an *exception*; ſo if he pleaded in bar *exceptio doli mali*, that the promiſe had been obtained by fraud, or *pactum de non petendo* a releaſe, or *juſjurandum de non agendo*, a covenant of the plaintiff that he would not ſue; all theſe pleas, though they diſſolved the natural obligation of the defendant, did not diſſolve the civil obligation *ipſo jure*, *ſed ope exceptionis excludebant*.

Such were alſo the exceptions *litis finite*, *rei*

judicatæ and *tranſactionis* of a former final determination on the ſame point between the ſame parties (22), and of a compromiſe ſince the ſuit began.

If the plea was of a matter which took away the plaintiff's action *ipſo jure*, ſuch as a plea of payment or ſatisfaction, it was called *deſenſo*, a *defenſive matter*, and not properly an exception; for *exceptio* was "actionis *jure ſtricto* competentis *ob* "*æquitatem* excluſio (23)."

Theſe diſtinctions being well underſtood, it will clearly appear why *dilatory* exceptions (among which are to be reckoned thoſe *inepti libelli*, or *demurrers for want of form*) could not be admitted after conteſtation of ſuit, unleſs they had ſubſequently come to light—why ſome *peremptories*,

(22) *Res judicata* is when it is beyond the reach of appeal or reviſion.

(23) See Heineccius ad Inſtituta, lib. 4. tit. 13. Proprie dicitur *exceptio* quando actori competit actio, quia eſt actionis excluſio, quando autem actori nulla actio competit, id quod opponit reus proprie vocatur *defenſio*. Lanfranci praxis, ch. 4. de exceptionibus. But by modern juriſts the latter are called exceptions of fact, to diſtinguiſh them from the others, which are called exceptions of law; for, in its moſt extended ſenſe, the word *exception* included both, and was omnis rei allegatio ac defenſio qua intentio actoris vel *ipſo jure* vel ob *æquitatem* eliditur.

Baldus ſeems to underſtand defenſio in a different ſenſe, when he ſays, "Omnis allegatio declinatoria aut dilatoria "eſt defenſio."

ſuch as thoſe, *litis finitæ*, took away the neceſſity of any conteſtation of ſuit; for they did not reſpect the merits of the cauſe (24), but enabled the defendant to ſlide away from the action, and repelled the plaintiff at the very threſhold, ſince they were in truth reaſons why the defendant was not obliged to anſwer the plaintiff's charge at all; and why the reſt, called ſimply *peremptories*, whether anſwering to demurrers for ſubſtance or pleas in bar (for the civil law made no diſtinction, whether the objection appeared intrinſically on the plaintiff's own ſhewing, or was ſuggeſted firſt by defendant, but called it indifferently a peremptory exception) might be put in at any time before conteſtation of ſuit (25).

(24) Merita cauſæ non reſpiciebant, ſed actionem elidebant, et actorem a limine judicii repellebant, are the words of the civilians and canoniſts.

Theſe exceptions *litis finitæ* quæ impediunt litis ingreſſum are, according to Maranta, of four kinds.—Juriſjurandi—rei judicatæ—tranſactionis—and præſcriptionis. They ſometimes, however, were not conſidered as declinatory, or perempting the plaintiff's entrance upon his action, and might be oppoſed after conteſtation; and ſometimes the judge was not ſatisfied about them, and ſo the cauſe went on, and they were reſerved to the hearing. "*Iſtæ* exceptiones peremptoriæ aliquando requirunt altiorem indaginem. quo caſu "judex debet eas reſervare, et procedere ad ulteriora."—See for all this, Maranta, pars 6. de exceptione, n. 12, 13, 14.

(25) They might, however, be proved after; and in actions bonæ fidei, where forms were little attended to, might

If they anſwered to pleas in bar, it doth not ſeem ſo plain what is meant by ſaying that ſuch peremptory exceptions were to be put in before conteſtation of ſuit, or how they could admit of it, ſince he who pleaded a ſpecial plea was not called upon to plead the general iſſue, or perhaps could not do it without contradiction: by conteſtation of ſuit then, in this caſe, muſt be meant an affirmative conteſt, which would conſolidate with the exception (as e. g. true it is that I aſſumed but you have ſince diſcharged me) (26), or perhaps it is meant that the defendant might plead double, the general iſſue and a ſpecial plea, where they were not inconſiſtent. To ſay that it means that the exception muſt be put in before itſelf was conteſted, would be an unneceſſary truiſm.

Several exceptions might be put in one after the other, unleſs it appeared evident that the de-

be put in after conteſtation of ſuit. Some peremptory exceptions were ſo far privileged, that they could be put in even after ſentence. Such were thoſe of the ſenatus conſultum Macedonianum & Velleianum, which may be tranſlated pleas of minority and coverture, as to ſuretyſhips or ſecurities.

(26) And thus Heineccius in Pandectas, part 2. ſec. 32. ſeems to explain it. He ſays, Reus vel *narrationem facti veram eſſe concedit, petitionem tamen actoris exceptione peremptoria elidit*, vel facto et petitioni *pure* contradicit; priore caſu *litis conteſtationem affirmativam, poſteriore negavam eſſe dicunt.*

fendant was deſignedly endeavouring to delay juſtice, and to overpower his adverſary with delay and expence, a liberty which has been perhaps wiſely taken away in ſome of the modern continental courts (27).

Beſides the diſtinction of exceptions into dilatory and peremptory, they were alſo divided into civil and prætorian, e. g. the exception *de pacto* that the creditor had agreed not to ſue was not a legal plea, for it was *nudum pactum*, and the debtor remained bound; it was admitted therefore only by prætorian equity.—See Inſt. 4. 13. 3. Another diſtinction was into *nominate* and *innominate*, the latter ariſing *ex facto incidenti*, and called exceptions *in factum*. Another diſtinction was taken from the individual objects of each exception.

(27) In the Imperial Chamber, all exceptions within the party's knowledge muſt be put in at one and the ſame time, Corvinus, lib. 2. ch. 30. Quere, whether ſuch a regulation would not be uſeful in our own courts, where a ſucceſſion of demurrers, for want of form ſurely, often occaſions a mockery of juſtice? Nor doth there ſeem to be much reaſon why the client ſhould be made to pay more than once for the inſtructions given by experience to a young barriſter in good pleading.

It muſt be admitted, that the old practice was like the preſent. "Reus," ſays Baldus, "nequaquam aretatur ad "unam exceptionem, favore defenſionis; etiamſi lis eſſet "conteſtata ſuper ea, tamen poteſt eam emendare, & cumu- "lare alias." So, he obſerves, upon an appeal alſo, after ſuit conteſted, he may ſtill put in one or more exceptions.—Baldus in 7 um. Codicis de Appellationibus.

The defendant having pleaded, the plaintiff replied, and defendant might rejoin under the name of duplicatio; and ſo they might carry on the pleadings to a ſur-rejoinder and rebutter under the name of triplicatio and quadruplicatio (28); but in well-regulated tribunals the parties were ſeldom ſuffered to go beyond the duplicatio.

When, in this courſe of pleading, they came to a point which was affirmed on one ſide, and denied on the other, they were then at iſſue, as with us; and this contradiction was alſo (though, as I have ſaid (29), I think not according to the ſtrict and original uſage), called a conteſtation of ſuit; ſo that in a looſer ſenſe the ſuit was conteſted whenever they came to ſome point of fact, that was then ready for trial, or, as Heineccius ſays, *ubi judex datus eſt*, when the prætor was ready to ſend the cauſe to the jury. From this time, *ſtrictly* ſpeaking, the cauſe was ſaid to commence, though in a more lax ſenſe it commenced with the citation.

After conteſtation of ſuit, no change or alteration could be admitted in the libel, e. g. it could not be changed from a petitory to a poſſeſſory

(28) Theſe Latin names were actually given to our pleadings in the early times of the Engliſh law.—See Inſt. 4. 14. Bracton, lib. 5. Tr. 5. ch. 1. Black. Comm. ch. 20. p. 310. Quotcunque vero allegationes concedent leges & judices, ſemper reo ultima allegatio competit.—Hein. pars 6. 361.

(29) See Heineccius, or the 5th book of the Pandects, part 2. ſec. 31.

claim. The proctor became dominus litis, and could make a ſubſtitute, and could not be revoked without cauſe—this was the regular time for adminiſtering the oath of calumny, for he cannot be ſaid *calumniari, qui judicium nondum ſuſcepit* (30); and laſtly, as has been ſaid, it was too late to put in any dilatory exceptions, and many of thoſe peremptory were alſo by it excluded from being ſubſequently propoſed.

The ſuit being fully conteſted, matters were no longer tranſacted in *jure*, but in *judicio*; the cauſe went from the prætor to the judices, or, in other words, it was ready for trial (31): the

(30) See Gail, lib. 1. Obſ. 34. See alſo the Code 2. 53. De juramento propter calumniam dando. In ſome reſpects the judicium was ſaid to begin from the citation; particularly in one which poſſibly might have thrown ſome light from analogy on a queſtion much agitated not long ſince in the Iriſh court of exchequer, in Swan *v.* O'Donnell, where, upon appeal, it was firſt determined that the ſubpœna was not the commencement of a ſuit ſo as to prevent ſtatutes of limitation from running, and afterwards by the houſe of lords that it was.

By the civil law, the mere citation was ſufficient to interrupt preſcription and limitation. See Gail, as above, and the commentators quoted by him on the Code upon theſe ſubjects.

(31) Heineccius's account of the matter in his Antiquities, ſhews clearly how much they were a jury:—"*Prætor*," ſaid he, "de jure cognoſcebat, decernens, quid "*jure* ſit pronunciandum ſi actor intentionem ſuam pro-

judices then were ſworn (32), and if the party diſapproved of any of them, ſuch perſons might be challenged and ſet by even, as I conceive, without ſhewing cauſe (33).

" baſſet: *judex* deinde de *facto* diſpiciebat, utrum actor " actionem ſuam an reus exceptionem poſſit demonſtrare:" Si juris tantum eſſet quæſto prætor ſolus *extra ordinem* cognoſcebat. Is not this a deſcription of the different provinces of a judge and jury?—See Heinec. Antiq. lib. 4. tit. 7. and Gerard Noodt. l. 8.

(32) *Sic ſcituri*, ſays Juſtinian, *quod non magis alios judicant quam ipſi judicantur.*—Code 3. 1. 14.

(33) As the jury, however, ſeem to have been ſtruck at an earlier period, ſo the challenges or recuſations ſeem to have been before conteſtation of ſuit, like the ſtriking of a ſpecial jury; for the Code ſays, lib. 3. tit. 2. 16. Apertiſſimi juris eſt, licere litigatoribus judices *delegatos*, antequam lis inchoetur, recuſare—unleſs *lis inchoetur* may here mean going to trial, or examination of witneſſes.

This *recuſatio judices*, which in my opinion meant nothing more than the challenging of a juryman, has been ſpoken of, by authors in general, as if it was a power of refuſing or declining the juriſdiction of the court itſelf, on account of objections to the perſon of the judge of the bench; and ſuch is the conſequence of ambiguity of words, and of the falſe tranſlation of the term judex, that in the early periods of our own law, Bracton and Fleta ſay that a judge may be refuſed for a good cauſe; though now, ſays Sir Wm. Blackſtone, the law is otherwiſe, and it is held that judges and juſtices cannot be challenged, and the ſame holds, I conceive, of judges eccleſiaſtical.—Comm. book 3. ch. 23. And the civil law is not ſpeaking of judices ordinarii.

EVIDENCE.

All things being ready, the party went into proof: proof was diſtinguiſhed into *full* and partial, or *ſemi-plene.* Full proof conſiſted in confeſſions, teſtimony of witneſſes, public written inſtruments and deeds, oaths, and preſumptions. The *probatio ſemi-plena* was made by one witneſs, by private books of account, by common fame, and by compariſon of hand-writing. Maſcardus ſubjoins to theſe two ſpecies of proof, ſigns and conjectures (34). The conjunction of two half proofs, of courſe produced a *plena probatio.*

I never heard of ſuch an attempt in modern times to recuſe eccleſiaſtical judges, but Ayliffe, in his hiſtory of the Univerſity of Oxford, mentions an inſtance, and the judges in Scotland, e. g. thoſe of ſeſſion may be declined for good cauſe. See Erſkine's Inſtitutes, book 1. ſec. 13.

(34) See for the whole of the above diviſions, Maſcardus de probationibus, lib. 1. Wood's Civil Law, p. 310, &c. I have not inſerted *notoriety*, which is rather conſidered as ſuperſeding the neceſſity of all proof, becauſe its limits are too vague to afford any rules for ſaying where a judge ſhall pronounce a thing to be notorious; ſome caſes are plain, e. g. it would be abſurd to aſk for proof, that there was a civil war in England, in the reign of Charles I. * Maſcardus alſo gives a chapter on the *evidentia facti*, as if a thing happened in ſight of the court; but this is not properly *probatio*, it ſuperſedes its neceſſity, and is like our trial by inſpection.

* Quæ vel nemo negat, populo vel teſte probantur,
Vel ſe ſubjiciunt oculis, notoria dicas. LYNDWOOD

The eſſential rules of evidence will be the ſame among all nations governed by reaſon, as that no man ſhall be a witneſs in his own cauſe (35),—that in every iſſue the affirmative is to be proved (36),—that hearſay is no evidence (37), while the technical rules, e. g. ſuch as reſpect the number of witneſſes, or the mode of their examination, may infinitely vary.

Confeſſions. This word confeſſion, though ſometimes applied to voluntary acknowlegements in a civil caſe, is generally uſed by the civil law as it is by us, with reference to crimes. The confeſſion muſt have been voluntary, neither extorted by fear, nor induced by hope or promiſe of pardon, nor could it affect any but the party himſelf, and to make full and concluſive evidence it muſt be made in a court of juſtice (38),

(35) Omnibus in re propria dicendi teſtimonii facultatem jura ſubmoverunt, Code 4. 20. 10. Nullus idoneus teſtis in re ſua intelligitur. Dig. 30. 10. 10.

(36) Ei incumbit probatio qui dicit non qui negat, Dig. 22. 3. 2. Non poſſeſſori incumbit neceſſitas probandi poſſeſſiones ad ſe pertinere, Code lib. 4. de probationibus, as with us in ejectments.

(37) Teſtes rationem *ſcientiæ* reddere tenentur: non admittuntur *ex fama* dicentes teſtimonium. See Heinec. in Pandectas, vol. 1. part 4. ſec. 143.

(38) ANSWER OF DEFENDANT.

It may appear odd that I do not here, under this head, annex ſome account of the perſonal anſwer of the defendant in the civil law, from which anſwers in equity are ſup-

for otherwiſe it was only extrajudicial diſcourſe. which amounted but to half proof, proviſions

poſed to be derived; but in truth I can find no clear account of any ſuch mode of proceeding in the civil law, and almoſt begin to ſuſpect that it did not exiſt but in the deſigning imaginations of the Canoniſts. The authors who ſpeak of it as the mode of the civil law, ſuch as Wood and Ayliffe, refer to authorities which do not ſupport them, which indeed they frequently do in other caſes.

They generally refer to interrogatory actions, or to the eleventh book of the Pandects, tit. 1. de Interrogationibus. But interrogatory actions were confined to a few caſes, and particularly introduced to diſcover to what ſhare of the *As* or inheritance the defendant was entitled, becauſe if the plaintiff came upon him for more than his ſhare, he was nonſuited; it being a principle of that law, in actions *ſtricti juris*, like the rule in our action of debt, that if he went for more than was due, he failed in his action; it was therefore a bill of diſcovery, to lay the foundation of a future action; and when the ſame Pandect ſays, "hodie "autem interrogatoriis actionibus non utimur. Nemo enim "de jure ſuo ante judicium reſpondere cogitur," though it may be implied, that he was forced to anſwer in judicio, yet it may fairly be inferred, that it was only as to ſuch matters, and they were a few enumerated, which had formerly been the ſubjects of interrogatory actions. Heineccius properly obſerves, in his comment on this book of the Pandects, that theſe had no ſimilitude to perſonal anſwers. "Huc non pertinent poſitiones, quæ hodie ab actore re- "ſpectu actionis offerri ſolent, eum in finem, ut præſtito "jurejurando, adverſarius ad ſingulas *categorice* reſpondeat, "illæ enim interrogationes ad *inſtruendam* actionem, hæ "probationis ſuſcipiendæ cauſa inventæ."

Wood, in ſpeaking of the oath of truth ſays, it is when the plaintiff or defendant is ſworn upon the libel or allega-

very ſimilar to our own; but to a ſolemn confeſſion at the point of death, more attention was

tion, to make a true anſwer of his knowlege as to his own fact, and of his belief to the fact of others. One would imagine, as to the defendant, that this was a deſcription of an anſwer in equity, but it is not: the oath of truth was an oath taken by a party as to the value of a thing, to which no other proof could be brought, but it was not deciſive like that to which the other party referred, and agreed to be bound by it.

What is ſaid of the neceſſary oath in the twelfth book of the Pandects, ſeem to connect much nearer with the point, but that is ſaid by Ayliffe and Wood to mean only what is well known by the name of the *ſuppletory* oath, or rather it had the meaning explained in the next page, and certainly was unlike our perſonal anſwers.

The Code ſaith, Deteſtibus, lib. 4. 20. 7. "Nimis grave "eſt quod petitis urgeri partem diverſam ad exhibitionem "eorum, per quos ſibi negotium præbet. *unde intelligitis* "*quod intentiones vectræ propriæ debetis affere probationes*, "non adverſus ſe ab adverſarii adduci," however, though this ſeems to indicate a general principle, yet as it refers particularly to the production of witneſſes, I cannot argue from it.

Without ſaying that perſonal anſwers were unknown to the Romans, (and it is obſervable that Judge Blackſtone only ſays, they were borrowed from the eccleſiaſtical courts), I ſhall only add, that I have not found any ſpecific head upon them, and therefore have not introduced them into the text. The treatiſes on the practice of equity courts, which compare our anſwers to the Roman, evidently confound the plea of the general iſſue with a perſonal anſwer, as, in common parlance, whatever the defendant ſays may be called an anſwer to the plaintiff. There is no title *de*

paid, and it might, by the aid of circumſtances, amount to a full proof like a judicial confeſſion.

It is curious to obſerve, how in ſpeaking of confeſſions, the civil law takes the ſame precau-

reſponſis in the corpus, C. L. and one only *de interrogationibus*, and that is inapplicable.

Perſonal anſwers I imagine were not known till *poſitions* were introduced, and that was by the Canoniſts, and not till the time of Gregory the Ninth; ſo ſay the Commentators, when commenting on that paſſage of the Clementine Conſtitutions, mentioned below. There was, it is true, a *neceſſary* oath, which might be impoſed on the defendant, if he denied the debt, for in the Pandects, lib. 12. ſec. 34. it is ſaid, *Ait prætor eum a quo jusjurandum petitur, ſolvere, aut jurare cogam*, but this was a *general* oath of denial, not a *ſpecial* anſwer to poſitions or interrogatories; and beſides, this oath was only adminiſtered by the prætor, where the plaintiff not having proof, offered to reſt on the defendant's oath, and might be avoided by the defendant's ſaying to the plaintiff, You know more of the circumſtances—I will leave it to your oath.

It is true, the judge, as appears from 11 Dig. 1. 21. might interrogate. *Ubicunque judicem æquites moverit, æque opertere fieri interrogationem dubium non eſt*, but this was not the queſtioning by the party, and perhaps was confined to ſuch matters as had been the ſubjects of interrogatory actions.

There ſeem to be the moſt direct authorities for my opinion in the Clementine Conſtitutions, lib. 5. "De "verborum ſignificatione, tit. 11. cap. 2. where it is ſaid, "Poſitiones ad faciliorem expeditionem litium, propter "partium confeſſiones, & articulos ad clariorem proba-

tions with our courts of equity, that the admiſſion of one fact ſhall not take away the neceſſity of proving a *diſtinct* fact inſiſted upon by the way of avoidance, as where one confeſſes that he killed Titius in his own defence, the admiſſion of killing doth not take away the neceſſity of proving that it was in ſelf-defence. But if it be *one* fact, as if on a charge of receiving 100l. it is anſwered, yes I did, which you owed me; the whole confeſſion muſt be taken together. See Wood's Civil Law, 311.

Witneſſes. Much time is ſpent by the Civilians and Canoniſts in comparing the authority of written and oral teſtimony, i. e. of records or deeds, and depoſitions taken down from oral teſtimony.

One famous Canoniſt (39) is ſuch an enemy to parchment, that he ridiculouſly laughs at the credit paid to the hide of a dead animal, while others, conſidering the fallibility of witneſſes, and uncertainty of memory, preſer written evidence;

" tionem *uſus longævus* in cauſis admiſit." And in Heineccius, in Pandectas, pars 2. 42. " *Poſtquam* enim litis con-" teſtatio *explicita* & *ſpecialis* ad *ſingula capita* libelli in foro " paſſim penetravit;" which quotation, though it may ſeem to contradict my notion of the litis conteſtatio, proves his opinion, that ſpecial anſwers were of a later date.

(39) The Abbas Parnormitanus, a very celebrated author in former times, and who is not unnoticed in ſome of our old reporters, for inſtance, by Sir John Davies, in the caſe of the dean and chapter of Ferns.

and Maſcardus, with much labour, endeavours by a diſtinction to reconcile the parties. See Maſcardus de Probationibus, vol. 1. queſtio 6 a.

The firſt requiſite upon producing witneſſes was to have them ſworn; and this is particularly required by the Code, lib. 4. tit. 20. 9. *Jurisjurandi* religione *teſtes cogi, priuſquam perhibeant teſtimonium jamdudum præcepimus.*

No man could refuſe to give his teſtimony after being properly cited, whether in a civil or criminal caſe; but the perſon at whoſe requeſt they were ſummoned was obliged to allow them the reaſonable expences of their journey, if they came from diſtant parts; and, in extraordinary caſes of illneſs or old age, they might be examined at their own places of reſidence (40).

But though, in general, no man could refuſe to give teſtimony, ſave in certain excepted caſes of relationſhip, yet many orders of men were of courſe excluded from giving teſtimony in any cauſe whatſoever. "Quidam propter reverentiam

(40) Conſtitutio jubet non ſolum in criminalibus judiciis, ſed etiam in pecuniariis unumquemque cogi teſtimonium perhibere de his quæ novit cum ſacramenti præſtatione, vel jurare ſe nihil compertum habere.—Code 4. tit 20. de teſtibus, l. 16.

Teſtes non temere evocandi ſunt per longum iter, & multo minus milites evocandi a ſignis vel muneribus, perhibendi teſtimonii cauſa.—Dig. lib. 22. tit. 5.

Omnibus autem teſtibus ſine damno & impendio ſuo, &c. Code 4. 20. 16.

"perſonarum, quidam propter lubricum conſilii, "alii vero propter notam & infamiam vitæ ſuæ "non admittendi ſunt ad teſtimonii fidem," ſay the Pandects, 22. 5. 3. 5.—to which muſt be added the ground of intereſt, while others were excuſed for multifarious reaſons from attending in court at leaſt.

The *reverentia perſonarum* ſeems to have excuſed ſome perſons of the higheſt orders from being ſummoned into a court of juſtice, for inſtance biſhops (41); and this phraſe alſo ſometimes reſpects the perſons concerned in the trial: thus the freedman could not be a witneſs againſt his former maſter, or that maſter's wife, from the reſpect due by him to their perſons.

Under this head may perhaps, with propriety, be placed the excuſation of perſons on account of relationſhip, which was carried to a very extra-

(41) Nec honore nec legibus epiſcopus ad teſtimonium dicendum flagitetur. item dicit Theodoſius, epiſcopum ad teſtimonium dicendum admitti non decet, nam & perſona oneratur, & dignitas ſacerdotis exempta confunditur. Sed judex mittat ad eos quoſdam de ſuis miniſtris, ut *propoſitis* ſacroſanctis evangeliis, ſecundum quod decet ſacerdotis, dicant ea quæ noverint, non autem jurent.—Code, lib. 1. tit. 3, 17.

So by the canon law, the goſpels were ſet before the biſhop *propoſita*, but he need not kiſs the book.

Yet, in general, magiſtrates might be forced to give teſtimony, and even the prætor, in a cauſe of adultery, which ſhews the peculiar indignation at that offence.

ordinary and abſurd degree, as may be ſeen in the note (42), and in one inſtance, as to parent and child, amounted to abſolute excluſion; and the right of the client to prevent his advocate or proctor from revealing the ſecrets officially entruſted to him, may be claſſed under the ſame head.

The *lubricum conſilii*, or want of diſcretion, excluded infants and thoſe under age of puberty, unleſs they were *pubertati proximi*; and in criminal caſes, no perſon under twenty years of age was admitted to give teſtimony. I need not ſay that idiocy or inſanity was even a ſtronger objection. Some have doubted, though without cauſe, whether women could be witneſſes in any court (43), on account of the weakneſs of the ſex. It is impoſſible that the wiſdom of Rome ſhould have put ſuch an abſurd affront on their underſtandings.

The *nota* related to perſons *in vinculis*, the *infamia vitæ* to all perſons rendered infamous by

(42) "Nec cogendum aliquem teſtimonium dicere adverſus ſocerum, generum, vitricum, privignum, ſobrinum, ſobrinam, ſobrino natum, eoſve qui priore gradu ſunt."—See Heineccius in Pandectas, vol. i. p. 453.

"Parentes & liberi invicem adverſus ſe nec volentes ad teſtimonium admittendi ſunt."—Code 4. 20. 6.

(43) With reſpect to wills, ſays Dr. Taylor, their teſtimony was not admitted, becauſe the ſex was excluded from thoſe ſolemnities with which wills were made—but where their teſtimony was a matter of evidence, there ſeems no good reaſon for rejecting it.—See Ellis's Summary, p. 120.

their crimes and punishments; to women of abandoned character; to infidels, apostates, and heretics; and even the slave and the beggar, though not branded with infamy, were from the vileness of their condition incompetent, while any other evidence could be had (44).

The objection of interest excluded not only near relations, but even intimate friends or mortal enemies (45), or any person who had before given testimony against the party (46). A fortiori, the common objections of interest, rendered a witness incompetent.

Persons excused from attending in court, and who had the privilege of being examined at home, or where they resided at the time, were very old men, soldiers on service, public ministers or magistrates abroad on the service of their country, and other persons whose attendance was rendered

(44) We cannot read without horror such passages as the following; "Si ea rei conditio sit, ubi harenarium testem "personam admittere cogimur, sine tormentis testimonio "ejus credendum non est."—Pandects, lib. 22. 5. 21.—and again, "Tormentis subjiciendi si plebei sint."—Code, lib. 4. 20. 15.

(45) See Code de testibus, lib. 17. Wood quotes to this, D. 22. 5. 3. but there is no such authority there.

(46) This extravagant position is found in the Pandects, lib. 22. 5. 23. "Produci testis is non potest, qui ante in "eum *reum* testimonium dixit." Heineccius reasonably thinks that the reading should be in eam *rem*, to the same matter.

impracticable by foreign impriſonment, or other ſituation.

Having thus enumerated the perſons excluded or excuſed from giving teſtimony, I proceed to eſtimate the weight to be given to the evidence of thoſe who were legally admitted: this depended of courſe on their number, their integrity, their ſkill, the conſiſtency of the circumſtances, and the contrariety of evidence.

The number of witneſſes was to be moderated and regulated by the good ſenſe and prudence of the judge; but it was the well known rule of the civil law, that at leaſt two were required (47).

The conſiderations reſpecting the integrity of the witneſſes, the regard to be had to the conſiſtency of circumſtances, or *negotii qualitas*, and the rules for balancing oppoſite teſtimonies, are dilated upon in the twenty-ſecond book of the Pandects, for

(47) "Judices moderentur & eum ſolum numerum teſ-
"tium quem neceſſarium eſſe putaverint evocari patiantur,
"ne effrænata poteſtate ad vexandos homines, ſuperflua mul-
"titudo teſtium protrahatur."—Pandects, lib. 22. tit. 5. 1.
"Ubi numerus teſtium non adicitur, etiam duo ſufficiunt,
"plurium enim elocutio, duorum numero contenta eſt."—
Ibid. 12.

"Sanximus, ut unius teſtimonium nemo judicum in
"quacunque cauſa facile patiatur admitti, et nunc mani-
"feſte ſancimus, ut *unius* omnino teſtis reſponſio non au-
"diatur etiamſi præclaræ curiæ honore præfulgeat."——
Code 4. 20. 8.

which I muſt refer the reader to the note below, (48).

After the qualifications of witneſſes, and the weight of their teſtimony, our next conſideration is the manner in which they were examined. Common opinion has always made this to be in ſecret, by depoſitions taken down in writing by an examiner, like the mode in our eccleſiaſtical and

(48) "In teſtimoniis dignitas, fides, mores, gravitas examinanda eſt," D. 22. 5. 2. "Teſtium fides diligentur "examinanda ideoque in perſona eorum exploranda erunt "in primis conditio cujuſque, utrum quis decurio, an plebeius ſit et an honeſtæ inculpatæ vitæ, an vero notatus "quis et reprehenſibilis, an locuples vel egens, ut lucri "cauſa quid facile admittat vel an inimicus ei pro quo teſtimonium."—D. 5. 3.

"Si teſtes omnes ejuſdem honeſtatis et exeſtimationis "ſint, et *negotii qualitas* et judicis motus cum his concurrit, "ſequenda ſunt omnia teſtimonia; ſi vero ex his quidam "eorum aliud dixerint, in impari numero, credendum eſt "id quod naturæ negotii convenit, et quod inimicitiæ aut "gratiæ ſuſpicione caret, confirmabitque judex motum animi "ſui ex argumentis et teſtimoniis et quæ rei aptiora et vero "proximiora eſſe comperuit; non enim ad multitudinem "reſpicere oportet, ſed ad ſinceram teſtimoniorum fidem, & "teſtimonia quibus potius lux veritatis adſiſtit."—Pandects 22. 5. 21.

"Qui falſo vel varie teſtimonia dixerunt vel utrique parti "prodiderunt, a judicibus competenter puniuntur." ibid. 5. 16. "Qui falſa in teſtimoniis protulerit, primum quidem "de perjurio, deinde de falſi crimine convenitur."—Code 4. 20. 13.

equity courts; yet there is the ſtrongeſt reaſon to ſuppoſe that this was not the principle or practice of the civil law until the lateſt periods of Rome, and the diſtorting comments of the canoniſts ſhew how much they were puzzled to torture expreſſions the moſt ſimple to their oppreſſive purpoſes (49).

(49) That in the time of Quintilian, witneſſes were examined viva voce in open court, muſt be apparent to every reader. All that he ſays about their croſs examination would be nonſenſe upon any other ſuppoſition. I ſhould ſuppoſe, from the words of Adrian in the Pandects, lib. 22. tit. 5. 3. that the ſame was the practice in his time, where he ſays, "Teſtimoniis apud me locus non eſt—teſtibus non "teſtimoniis eſſe credendum—ipſos teſtes interrogare ſoleo." But this commentators interpret to mean only that the depoſitions were not to be taken at a diſtance, but the witneſſes brought up to the judge, to be by him ſtill ſecretly examined. In like manner they conſtrue the words of the Novels. 90. chapter the laſt, which ſays, "Teſtium pro-"ductio non niſi præſente fiat adverſario," to mean only, that the parties muſt be preſent at the *production* of the witneſſes, not at their *examination*. But Heineccius ſeems to me to be of opinion that theſe are all forced conſtructions, when he ſays, Hodie tamen partes quidem præſentes ſunt teſtibus jurantibus, ſed ubi examen inſtituitur ſecedere jubentur. Qui error pragmaticorum partim ex male intellecto textu, lib. 14. Code, tit. partim en prava verſione Novels, 80. Cap. ult, ubi verba, Και ἀκουσαι τῶν μαρτυρῶν vertunt *ut videant jurare teſtes*, partim ex canonico jure natus videtur. See Hein. on 22. lib. Pand. tit. 5. ſec. 132. And again in his Antiq. lib. 4. tit. 17. ſec. 16. Audiebantur teſtes non remotis partibus ceu hodie fieri ſolet ex mala

The witneſſes might be produced and examined three times; but their production a fourth time was not allowed unleſs upon very peculiar circumſtances and occaſions, for after three examinations publication followed (50).

Public written inſtruments.—Such were the public acts perfected by magiſtrates—the cenſors tables—the public accounts—the archives of the ſtate—inſtruments atteſted by public notaries.—In ſhort, whatever reſted upon public faith and authority, and ſuch documents were deemed ſuperior to any living witneſs (51).

Oaths.—Oaths were *voluntary*, *neceſſary*, and *judicial*—the firſt require no explanation; the ſecond were impoſed by the judge upon one party at the requeſt of the other, the latter agreeing to

intellecta Zenonis conſtitutione, lib. 14. Codicis de teſtibus. Where *ſecretarium*, meaning a court, was miſtaken for a ſecret place. And again, in the ſame place, Heineccius ſays, "Romani producentem teſtes ſemper adeſſe patiebantur ut eos interrogaret, qua in interrogatione præcipue elucebat oratorum ſolertia." But how will Heineccius get over ſuch expreſſions as theſe? "Si teſtes producens *editionem* nondum acceperit, neque teſtationes, *perlegerit*." Novels, 90. cap. 4.

(50) See Novels, 90. whoſe title is, "Ut cognitis teſtimoniis, quartæ productioni teſtium locus non ſit;" from hence our three probatory terms—poſſibly our three allegations.

(51) Cenſus & monumenta publica, potiora teſtibus eſſe ſenatus cenſuit.—Pandects 22. 3. 10.

be determined by it; i. e. the plaintiff or defendant ſaid, I will give up the point if my opponent will ſwear to his cauſe of action: but this, as I have obſerved, is evidently and totally unlike a ſpecial perſonal anſwer. Judicial oaths were impoſed by the judge of his own mere motion. The laſt comprehended the *ſuppletory* (52), adminiſtered to him who had made but half proof, and the *purgatory* to him againſt whom preſumptions and circumſtances militated. The oath *ad litem* muſt be added, when there was no queſtion about a cauſe of action, but only about the value of the thing ſought, which if it had been loſt through the fault of the defendant, was eſtimated at its real value by the *oath of truth*; if by his *fraud*, at more than its real value, by the oath *adfectionis*.

Preſumption.—We are ſomewhat ſtartled at ſeeing preſumption ranged among full proofs; but this could be meant only of ſuch forcible preſump-

(52) I muſt obſerve, that Burn and others ſtile theſe differently, calling the ſuppletory the *neceſſary* oath; and what I with Heineccius have called the *neceſſary*, they ſtile the *voluntary* or *deciſive oath*. Both of theſe were taken by the plaintiff, and were ſubdiviſions of the *juſjurandum in litem*. See Heineccius in Pandectas, pars 3. ſec. 49. Yet this oath of truth has been ſtrangely defined in modern times to mean quite a different thing, probably to juſtify the demand of perſonal anſwers. Thus Oughton defines it, "Quod ſubeunt teſtes de vere reſpondendo de poſitionibus." Tit. 110. in a note.

tions as admitted no proof to the contrary (53): ſuch were called *preſumptiones juris & de jure.* Where it admitted of contrary proof, and was drawn from circumſtances not *neceſſarily*, but only *uſually* attending the fact, if it was induced by the law always preſuming it; as for inſtance, that every man was innocent till the contrary was proved, it was called ſimply *præſumptio juris;* if it naturally originated in the mind of the judge, it was called *præſumptio hominis:* for example, the judge muſt preſume that every father would have an affection for his child, and *vice verſa*, that the preſumption was againſt a charge of parricide until proved.

Half proof.—Though a ſingle witneſs made but an half proof, yet there were exceptions to this general rule, as if in caſes of great difficulty no other evidence could poſſibly be had, or in unimportant cauſes, or where the witneſs was of very extraordinary rank or character (54): and, on the other hand, ſometimes a private writing was no evidence

(53) Such Sir Wm. Blackſtone, who here has copied from the civil law, calls violent preſumptions, Comm. vol. III. ch. 23, p. 371, though he is corrected by Dr. Chriſtian, who holds that proof may be admitted to repel all preſumptions whatſoever. See his note ibid. See much illuſtration of our doctrine of preſumptions, Cowper's Reports, pages 102. 110. and Fonblanque, vol. I. p. 319.

In a late caſe in Ireland between the vicar and pariſhioners of St. Andrew's, Dublin, this doctrine was fully gone into.

(54) Maſcardus de probationibus, lib. 1. quæſ. 11.

at all, as for inſtance, on behalf of the writer or party himſelf, unleſs produced by his adverſary; though now, ſays Heineccius, in Germany, a merchant's books of accounts rightly and duly kept, authenticated and produced, ſhall entitle him to have the ſuppletory oath adminiſtered to him (55): and in general, where half proof has been made, the ſuppletory oath, or oath of the party, is to be ſuperadded to make full proof, (56).

The defendant, if he had cauſe during all theſe proceedings, might have *reconvened* the plaintiff, i. e. filed his croſs bill or libel againſt him, and then both ſuits would have gone on *pari paſſu:* if he had no ſuch ground, or had neglected it, his only remedies after ſentence were *reſtitutionem in integrum petere* (57), *actorem calumniæ poſtulare, judicem falſi aut repetundarum poſtulare, vel denique interponere appellationem.*

(55) Heineccius in Pandectas, pars. 4. ſec. 134.

(56) The caſe of Williams *v.* Lady Bridget Oſborne is univerſally known. See Strange, 80. Burn's Eccleſiaſtical Law, vol. III. p. 90. I have known within my own practice the ſuppletory oath demanded by a huſband, who could produce no other proof of the marriage but his wife's letters.

(57) I have defined the *in integrum reſtitutio* too narrowly ch. 20. vol. i. It is thus deſcribed in the fourth book of the Pandects, title the firſt—"Sub hoc titulo prætor hominibus "vel lapſis, vel circumſcriptis ſubvenit, ſive metu, ſive "calliditate, ſive ætate, ſive abſentia, ſive errore."

Appeals.—Reſerving a more full conſideration of appeals for another place (58), I ſhall only take notice here, that appeals lay in all caſes, criminal as well as civil (59),—that an appeal interpoſed by one, operated for all his fellow-acuſed —that no appeal lay from an interlocutory, unleſs it had the force of a definitive ſentence, or induced a *damnum irreparabile* (60)—that appeals were to be carried not *per ſaltum*, but *gradatim*, to the next ſuperior judge (61)—that appeals might be interpoſed viva voce, or in writing, and apoſtles or letters diſmiſſory were to be demanded within thirty days—that nothing was to be attempted by the judge below pending the appeal,—he muſt tranſmit all documents and neceſſary papers—that the judge *ad quem* was liable to great penalties if he did not receive the appeal —and that the appeal muſt have been interpoſed within four days after ſentence, and proſecuted and finiſhed within a year, which was called *primum fatale*; but ſometimes a ſecond year, called

(58) See the Practice of the Canon Law.

(59) So ſays Heineccius—Wood ſays, only in *ſome* criminal; but the words of the code, 7. 62. 14. and 29. are general, except the cauſe was tried before certain great officers, as the Comes Orientis, or Prefectus Auguſtalis.

(60) Hence the ſame rule in the admiralty, which is peculiarly governed by the civil law; otherwiſe in the courts eccleſiaſtical.

(61) We ſhall ſee preſently how and why the canon law departed from this rule.

ſecundum fatale, was allowed; this was called, *terminus juris:* but generally a ſhorter time was appointed by the judge for proſecuting the appeal, which was called, *terminus hominis.*

From the ſupreme power of the prince, no appeal lay, but he might be prayed to review his ſentence. Sometimes the judge below, unwilling to take upon himſelf the weight of a critical cauſe, referred it to a ſuperior tribunal, which was called *relatio.*

Proceedings in criminal caſes. We have hitherto ſaid nothing of arreſts, becauſe, as we have obſerved above, after the cruel method of dragging the debtor *obtorto collo* was relinquiſhed in all civil caſes, there was no proceſs but ſummons and diſtreſs infinite (62); but in criminal, we have in the Code, 9th book, large titles, *de exhibendis & tranſmittendis reis—de cuſtodia reorum, et de privatis carceribus inhibendis,* which ſhew the natural and neceſſary difference in ſuch proceedings.

Public judgments differed from *extraordinary,* as the latter were inſtituted for crimes not coming

(62) Here by the civil, as well as by our common law, the proceſs ended in caſe of injuries without force. Blackſtone's Comm. book 3. ch. 19. p. 281. Perhaps in *actiones ex delicto* there might have been arreſts, but I am uncertain; the following quotation bears that appearance.

The law *Pætelia Papiria* decreed that no one, "*niſi qui* "*noxam meruiſet* donec pænam lueret in compedibus aut in "nervo teneretur." See Heinec. 2 Antiq. p. 151.

Noxa is any *maleficium* or *peccatum.*

under any ordinary ſpecific denomination, and therefore preſented before the general aſſemblies of the people, by a mode reſembling impeachments.

We have obſerved that criminal modes of trial were of three kinds; for *inquiſition* (63) and *denunciation*, however, we muſt look chiefly to the canon law; the civil law, though acquainted with theſe modes of proceeding, ſaying little of them in detail; but on *accuſations* it is more particular.

The right of accuſing, and the form of indictments, are diſcuſſed in one title in the Code, and one in the Pandects (64). The perſons forbidden to be proſecutors in their own names, were women and minors (except in treaſon, ſacrilege, or murder of their relations) perſons of infamous character, freedmen againſt their patrons, ſlaves, except for the murder of their maſters; the ac-

(63) As to inquiſitions, conſult Dig. 1. 18. 13. Among other inquiſitions, thoſe into the conduct of viceroys, governors, and magiſtrates, leaving their offices, who were obliged to ſtay in the province fifty days after the reſignation of office, are remarkable. C. 1. 49. 1. As to denunciations or official informations given in to magiſtrates and preſidents of provinces. See C. 9. 2. 7.

(64) De accuſationibus & inſcriptionibus. Dig. 48. 2. Code 9. 2. Lord Kaims ſaith, that the oath of calumny not being ſufficient to reſtrain falſe accuſers, they were obliged to indorſe their names on the bill of indictment, thence called *inſcriptio*, and ſo became liable to a lex talionis.

cuſed therefore might object to the capacity of the accuſer, and if he had ground, might prefer an antecategoria or croſs indictment. The inſcription or indictment required a particular and accurate deſcription of the crime, the perſon, the place, and the time; and it was to be ſubſcribed by the accuſer, that he might be duly puniſhed for a falſe accuſation.

The proſecution began by *in jus vocatione*, as did a civil ſuit, but here the power of actually arreſting the party continued to be the law at all times (65). The next ſtep was aſking leave from the court to bring the charge *nomen deferre*. The party appearing on the appointed day, the accuſer preferred his indictment ſubſcribed with his own name.—The court then appointed a day for the trial, uſually at the interval of thirty days. The accuſed then changed his dreſs and ſought for patrons, and if on the day appointed he did not appear, he was exiled. The trial ſometimes laſted ſeveral days, one day being often given

(65) Humanity will be pleaſed with the following priſon regulations. Statim debet quæſtio fieri, ut noxius puniatur, innocens abſolvatur; reum non per ferreas manicas & hærentes oſſibus mitti oportet, ſed prolixiores catenas ſi criminis qualitas catenas poſtulaverit, ut cruciatio deſit. Nec vero ſedis intimæ tenebras pati debebit, ſed uſurpata luce vegetari, et ubi non geminaverit cuſtodiam, in veſtibulis carcerum & ſalubribus locis recipi: ac reverente iterum die, ad primum ſolis ortum illico ad publicum lumen educi, ne pœnis carceris perimatur. 9 Code, tit. 4. *de cuſtodia reorum.*

to the accuſer to produce his proofs, another to ſpeak to evidence, and then the accuſed had ſtill an interval of ſeveral days to prepare for his defence. His defence being gone through, tables of wax were given to the judices, who wrote on them *A*, i. e. *abſolvo*—*C*, i. e. *condemno*, or, *N. L.* i. e. *non liquet*—the majority prevailed, and then the prætor, or his ſubſtitute, pronounced ſentence.

The venerability of the magiſtrates who thus pronounce ſentence, was guarded by their character, and by their oaths, though the latter, in proceſs of time, were ſadly perverted (66).

The compariſon of the prætor in the Roman tribunal to the modern chancellor, is in many reſpects fair, but the latter name has riſen to eminence only ſince the extinction of the Roman empire. Chancellor at Rome was the title of a very inferior officer (67).

(66) Originally they ſwore that they would judge cum veritate & legum obſervatione, Code 3. 1. 14. but latterly ſe facturos ſecundum id quod fuerit juſtius & melius, the latter word left infinite latitude, ibid. in auth. The law in Nov. 124. that the litigants ſhould give nothing to the judges, means to the judices or jury, who however claimed (as our juries do) a ſmall payment for their trouble, called *ſportula*, though they do not ſeem to have imitated our cuſtom of giving it in charity.

(67) *Cancellarius* was a door-keeper in the Emperor's palace. This word, ſo humble in its origin, has, by a ſingular fortune, riſen into the title of the firſt great office of ſtate in the monarchies of Europe, ſays Gibbon, vol. 1. p. 351. in a note.

I am ſorry that it is impoſſible, from want of ſpace, to give here a detailed account of the ranks of advocates, and regulations (68) reſpecting them and proctors in the Roman courts. The lawyer who would take the trouble to peruſe the ſecond book of the Code, from the ſixth to the thirteenth titles incluſive, which are upon this ſubject, would certainly derive much amuſement therefrom; his curioſity would be gratified with the various ranks and arrangements, his pride would be flattered with the honourable diſtinctions beſtowed upon them (69), and his judgment

(68) Some of them, however, I cannot refrain from copying, which may be found in the ſixth title of the fourth book of the Code. Ante omnia autem univerſi advocati ita præbeant patrocinia jurgantibus, ut non ultra quam litium poſcit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant, nam ſi quis adeo procax fuerit, ut non *ratione* ſed *probris*, putet eſſe certandum, opinionis ſuæ imminutionem patietur.

Nullum cum litigatore contractum ineat advocatus. Nemo ex induſtria protrahat jurgium. Quiſquis vult eſſe cauſidicus, non idem in eodem negotio ſit advocatus & judex. ſi ſub ſpecie honorarii, quod advocato uſque ad certum modum deberi potuiſſet, ſi qui advocatorum exiſtimationi ſuæ immenſa & illicita compendia prætuliſſe ſub nomine honorariorum poſcentes fuerint inventi, ab hoc profeſſione penitus arceantur.

(69) The bar was a ſure path to preferment; after a certain number of years of honourable ſervice, the advocates roſe of courſe to certain honours, if not profits, of no ſmall eſtimation; for they were dignified with the title of

would be pleaſed with the order and ſyſtem of the ſociety.

It is ſtrange that Lord Kaims ſhould ſay there was not among theſe barriſters any *calumniator publicus*, any officer reſembling that of our attorney-general, or of the king's advocate in Scotland. Of the public accuſer, a term ſince adopted by the French, we find mention both in Cicero

counts, as appears from the following extract from the eighth title of the ſecond book of the Code in its firſt order or decree, which is very remarkable, and begins thus—"Suggeſtionem viri illuſtris, comitis terum privatarum & "proconſulis Aſiæ diximus admittendam: per quam noſtræ "ſerenitatis auribus intimavit, fori ſui advocatos petitione "magnopere poſtulaſſe, ut, poſtquam advocationis depoſu-"erint officium, unumquemque eorum, qui in præſenti "ſunt, vel poſtea matriculis eorum pro tempore fuerint in-"ſerti, clariſſimi primi ordinis *comitis* perfrui dignitate; "quatenus et tempore quietis fructum præteritorum labo-"rum conſequantur, proque fide atque induſtria erga cli-"entes ſuos comprobata, a privatæ conditionis hominum "multitudine ſegregati, clariſſimis merito connumeren-"tur."

Mr. Gibbon, in his ſeventeenth chapter, thus deſcribes the honours and profits of the bar at Rome: "After a regu-"lar courſe of education which laſted five years, the ſtu-"dents of this lucrative ſcience diſperſed themſelves through "the provinces in ſearch of fortune and honours; nor "could they want an inexhauſtible ſupply of buſineſs in a "great and corrupted empire. The court of the Prætorian "Præfect of the Eaſt alone, could furniſh employment for "an hundred and fifty advocates. The firſt experiment "was made of judicial talents, by appointing them to act

and Pliny (70), and in later times we hear of the *advocatus fiſci* (71), who defended the cauſes of the treaſury. We find alſo in the court of the eaſt (72) a *primatem advocatum*, ſuch as in Ire-

" occaſionally as *aſſeſſors* to the magiſtrates; from thence " they were often raiſed to preſide in the tribunals before " which they had pleaded. They obtained the govern- " ment of a province, and by the aid of merit, reputation, " and favour, aſcended, by ſucceſſive ſteps, to the *illuſtri-* " *ous* dignities of the ſtate. In the practice of the bar, " theſe men had conſidered reaſon as the inſtrument of diſ- " pute*, they interpreted the laws according to the dictates " of private intereſt; the ſame pernicious habits might ſtill " adhere to their characters in the public adminiſtration " of the ſtate."—The paſſage is too long to allow further tranſcribing.

(70) Cic. pro Roſc.—Plin. Epiſ. 3. 17. See alſo Heinec. Antiq. lib. 4. 18. 17.

(71) See Code 2. 9. 4. and 10. 11. 5. There was an advocate or proctor of the exchequer, ſaith Wood, p. 305. who had a ſalary from the public. Their duty was to manage the cauſes of the prince and the public, and to *proſecute crimes*.

(72) The whole empire was divided into thirty-five military commanderies. All theſe commanders were *duces*, or dukes, ſome only of them were *counts*, which was a ſuperior title, invented in the court of Conſtantine. Among

* Mr. Gibbon here ſeems to think, that the technical mode of thinking of the mere lawyer, is not more accommodated to the extended ſphere of a ſtateſman's contemplations, than his technical phraſes to the language of an orator. No leſs men than Mr. Burke and Mr. Fox, ſeem to have adopted this idea on Mr. Haſtings's trial, too much juſtified at the moment by the part which the bar had taken on the queſtion, whether a parliamentary impeachment ceaſed by a diſſolution? we muſt allow at leaſt many illuſtrious exceptions; among the foremoſt in England, Lord Somers, in Ireland, the late Chief Baron Burgh.

land is ſtiled prime ſerjeant, and in Scotland dean of the faculty. See Code 2. 8. 3.

I have been ſilent as to impeachments before the people, or accuſations in the ſenate. They bear no relation to modern practice, and long before the times of Juſtinian they were no more. The following conſtitution of the emperor Leo, put an end even to any affected ſhare of the ſenators in the legiſlature, and is a melancholy leſſon to all ſenates. Its title is (73), "*Ne amplius* "*ſenatus conſulta fiant;*" and it ſays, "Quemad- "modumet in aliis legibus, quæ ad communem "rerum uſum nihil conferunt, fecimus; ut eas "tanquam ſupervacaneas e legum corpore ſub- "duceremus; ita hic quoque facientes eam le- "gem quæ ſenatoribus ferendarum legum poteſ- "tatem facit, e legum quaſi republica ſecerni "ſancimus, nam, ex quo ſenatoriam adminiſtra- "tionem imperatoria majeſtas ſibi vindicavit, "*inutilis* illa eſſe judicari debeat." Heaven grant that poſterity may never hear ſuch a ſentence of inutility pronounced upon our great councils of the nation!

theſe the Count of the Eaſt; Comes Orientis ſeems to have been moſt conſpicuous; hence a count of the empire founds ſo highly in Germany, which affects to repreſent the weſtern empire, as Ruſſia doth to repreſent the eaſtern.

(73) Imp. Leonis conſt. 78.

CHAPTER IX.

ON THE PRACTICE OF THE INSTANCE COURT.

THE firſt proceſs in this court is either *in rem*, or *in perſonam*. Clarke, in his practice, begins with the latter (1). We ſhall begin with the former as the moſt uſual and frequent.

Proceedings in Rem.

Theſe take place principally in ſuits for ſeamen's wages, when they proceed againſt the ſhip or cargo, this being their moſt expeditious mode, though they may alſo have their remedy againſt the maſter or owner (2).—In ſuits on hypotheca-tion, or bottomry bonds, in which the ſhip and

(1) We muſt ſuppoſe that the validity of this proceeding in any caſe againſt the perſon, was once doubted in the courts of law, ſince in 1 Siderfin, 161, one of the judges ſays, the admiralty may grant proceſs againſt the perſon *alſo*, as has been lately agreed.

(2) As is the conſtant practice, and admitted to be right in Howe and Napier, 4th Burrow's Reports.

goods are ſolely and ſpecifically bound—in ſuits inſiſting on a right of poſſeſſion, where there is a clear *conſtat* of the property, as where one part owner unjuſtly refuſes poſſeſſion of the ſhip to the maſter nominated by the majority of his partners—and in actions for colliſion, where there is no pretence for making the owner anſwerable, or demanding reparation, *as againſt him* (3), beyond the value of the ſhip.

In actions for aſſault and battery, commonly called actions of damage, in ſuits by ſeamen againſt maſters and owners, in ſuits againſt perſons having in their hands the proceeds of ſhip or cargo, in admiralty actions on ranſom bills when allowed by law, and if the ſhip is not to be had, the proceſs muſt neceſſarily be againſt the perſon, but theſe caſes more rarely occur.

When the proceeding is againſt the ſhip, the action being entered, and an affidavit of the debt made by the perſon on whoſe behalf the warrant is prayed, or by his lawful attorney, proceſs commences by a warrant directed to the marſhal of the court, commiſſioning him to arreſt the ſhip or goods, or both; which warrant contains alſo a citation to the maſter of the ſhip in particular, and all others in general, having, or pretending to have, an intereſt in the ſaid ſhip, her tackle, apparel, and furniture, or (as

(3) For againſt the maſter, according to Bynkerſhoek, there is remedy in *ſolidum*, and beyond the value of the ſhip.

the caſe may be) in the cargo or goods, to appear perſonally on a day, and at a place therein named, to anſwer and defend, in a certain cauſe, civil and maritime. This warrant is executed by producing the original before the maſter and crew, and affixing a copy to the maſt of the ſhip; after which an affidavit muſt be made of the following tenor, to wit, that the deponent did arreſt the ſhip mentioned in the warrant thereunto annexed, her tackle, apparel, and furniture; and that he did cite all perſons in general, and thoſe requiſite, in ſpecial, to appear as above; and if the arreſt be made abroad, it muſt be certified under ſome authentic ſeal. This warrant and affidavit or certificate, are then to be returned, and if there be any apprehenſion of the ſhip's being carried to ſea, the ſails may be taken on ſhore, or a ſufficience put on board.

The ſhip being thus arreſted, a proctor appears for the promovent, and makes himſelf party for him; and either the owner will appear to defend his intereſt, and by voluntarily entering into a ſtipulation (4), give juriſdiction to the court over him perſonally, or by not entering an appearance (which, perhaps, if the demand exceed the value of the ſhip, he may think ſuperfluous), may oblige

(4) The nature of ſtipulations in the civil law, the attempts to prohibit the admiralty courts from taking them, and the difference between them and recognizances, have been ſtated in preceding chapters; the origin of the name is ſaid to be this.

the court to proceed for defaults, which word here ſignifies non-appearance.

The proceeding for defaults is as follows: The warrant which iſſued againſt the ſhip having been returned with the marſhal's certificate of its execution, and a proctor having appeared for the promovent, and none of the perſons generally or ſpecially cited appearing on the day, or at the place aſſigned, after being thrice publicly called in court, their contumacy is accuſed; and in pain of this contumacy, the ſhip, or rather they, are ſaid to incur the firſt default: and then time is given to them to appear on the next court day, which is technically called continuing the certificate of the execution of the warrant to that day. This ſtep is repeated four times, on four ſucceſſive court days, as will be better underſtood from a view of the proceedings in ſuch a caſe given in the note below (5), and then the four defaults being incurred, (for the citation

(5) *Rules of Court where no Appearance for a Ship arreſted.*

April 5. Warrant which had iſſued againſt a ſhip returned with affidavit of ſervice, and marſhal's certificate of the execution. A proctor appeared for promovent, and proclamation being thrice publicly made for all perſons in general having, or pretending to have, any right, title, or intereſt in the ſaid ſhip; but no perſon appearing, the judge, at petition of promovent's proctor, pronounced them in contempt; and in pain of their contumacy, decreed the firſt default to have incurred. Certificate of the execution of the warrant continued to next court day.

called *unum pro omnibus*, is not ſufficient to convict of contumacy, eſpecially in the claim of a

April 8. Second default incurred. Certificate continued as before.

April 11. Third default incurred. Certificate continued.

April 14. The judge aſſigned to hear the cauſe ſummarily this day; on which day, the fourth default having incurred, proclamation having been thrice made for all perſons, &c. and no perſon appearing, promovent's proctor, in pain for their contumacy, exhibited a ſummary petition with proper atteſtations to ſupport it, which the judge admitted: after which the promovent's proctor porrected a *firſt decree*, and alſo two bills of expences, praying them to be taxed, and made oath of the neceſſary expenditure. The judge read, ſigned, and promulged the ſaid firſt decree, and decreed a periſhable monition and commiſſion of appraiſement.

Fourth ſeſſion after, the above monition and commiſſion of appraiſement was returned, and the judge aſſigned the cauſe to be heard ſummarily on periſhable condition, which was done the next court day, and ſale decreed.

Rules in another Suit againſt Ship by Defaults.

Fourth ſeſſion, Eaſter Term, warrant which had iſſued againſt a ſhip returned with affidavit of ſervice, and certificate continued to next court day.

Firſt Seſſion, Trinity Term; firſt default and certificate of execution continued.

Second Seſſion. Second default.

Third Seſſion. Third default.

By day. Fourth default.

Certificate continued from court day to court day, to firſt Seſſion of Michaelmas Term, when promovent's proctor porrected a firſt decree, which judge ſigned and decreed

ſhip), the proctor of the complainant exhibits a ſummary petition, which Clarke calls the *articulus ex primo decreto*, reciting the cauſe of ſuit, the parties cited having been thrice called and not appearing, and his ſtanding in contempt by having incurred four defaults, whereupon the oath required by law having been made, viz. of the debt, the proctor of the complainant prays right and juſtice, and to be put in poſſeſſion of the ſhip, her tackle, apparel, and furniture, *to the extent of the debt* (6), to the intent that his property may be preſerved, and for the expences in that behalf, according to the form and manner of proceeding in that court.

This article or allegation being porrected to the judge, with a ſchedule of expences to be taxed, and an oath of their neceſſity, and the parties being again thrice called and not appearing, the judge pronounces them to be contumacious; and in pain of their contumacy, ~~admits the article above-mentioned~~; and the inſtruments on which the ſuit or debt is founded, e. g. a bottomry bond being exhibited to him, ~~and atteſtations~~

a periſhable monition, and commiſſion of appraiſement. Fourth Seſſion they were returned, and atteſtations brought in as to periſhable condition; and the judge aſſigned the cauſe to be heard ſummarily next court day on ſuch periſhable condition, when he decreed a commiſſion to ſell the ſhip.

(6) This limitation, as we have ſeen, was introduced by the Authentics.

made of the debt (7), a *first decree* is corrected to the court, and by it read, ſigned, and promulged, and the expences taxed: by this firſt decree (which recites the ſummary petition or article *ex primo decreto*), declares its admiſſion, and that the defaults have been incurred as alleged, the court decrees that the complainant ſhall be put in *poſſeſſion* of the ſhip, her tackle, apparel, and furniture, or as the caſe may be, of all the goods, wares, or merchandiſe, now or lately on board the ſame, to the extent of the debt, if the things ſo poſſeſſed be ſufficient; and if not, as far as their value; ſecurity being firſt given to anſwer for the ſame to any perſon claiming right, or intervening for their intereſt within a year.

The nature of a firſt decree (8), in the civil law has been explained in a previous chapter, and the reaſon given why no ſecond decree is

(7) This is the practice according to Clarke; but can this be neceſſary, ſince the late rule of the court, 28th January, 1801, requiring an affidavit of the debt previouſly to iſſuing the warrant? Before this rule was made, warrants were ſometimes obtained for oppreſſive purpoſes.

(8) The firſt decree ſeems to have been erroneouſly omitted in practice in Ireland, and the court to have uſually proceeded at once to appraiſement and ſale. I have ſpoken to practitioners there who never heard of the name.

Even in England, the notions concerning it ſeem to have been ſomewhat vague; ſee the caſe of the Exeter, 1 Robinſon, p. 173. where, under a primum decretum, there was not meant a delivery of poſſeſſion, but the ſhip was erroneouſly ſold without further application to the court.

neceſſary in the court of admiralty, where the proceeding is *in rem*, the firſt decree by the civil law giving nude poſſeſſion, and the lapſe of a year producing a poſſeſſory right and enjoyment of the fruits.

The effect of this firſt decree, is only in the firſt inſtance to put the party in *poſſeſſion* of the thing, and gives no power over the proceeds. All further proceedings of ſale, and power over the proceeds, muſt be by ſubſequent application to the court (9), although upon ſuch application, a decree of ſale and poſſeſſion of the proceeds are almoſt matters of form, and uſually obtained as ordinary proceſs of courſe. An allegation is commonly made of the periſhable condition of the ſhip, and of its actual or probable deterioration by time, concluding with a prayer that the ſhip may be appraiſed and valued, and decreed to be ſold; and that the monies ariſing therefrom be brought into the regiſtry. Or ſometimes there are two petitions or allegations, the firſt ſtating that the ſhip lies in the river, and praying a commiſſion of appraiſement to the marſhal, and then a further petition, alleging periſhable condition, and praying a ſale. Upon this the court decrees what is called a periſhable monition, i. e. it decrees all perſons to be moniſhed (by affixing

(9) See 1 Robinſon, p. 174 and 175. Groenwegen *de legibus abrogatis*, ſays the *Primum Decretum*, is totally out of uſe in modern days; ſurely not in England. I believe not on the continent.

an original monition on the Royal Exchange, and by leaving there affixed a true copy thereof) to appear in court on a certain day, and hear an allegation as to periſhable condition, and witneſſes being there ſworn, or a commiſſion iſſued to take their depoſitions, and ſuch their depoſitions publiſhed, to ſhew cauſe why the ſhip ſhould not be expoſed to public ſale, and the money proceeding from the ſale be brought into the regiſtry for the uſe of all perſons intereſted, with the uſual intimation.

If the cauſe is then aſſigned to be heard ſummarily on periſhable condition, which appearing by the atteſtations, the judge decrees a commiſſion to ſell the ſhip and cargo, or both, as the caſe may be, the proceeds to be brought into the regiſtry for the uſe of all perſons intereſted.

*This appears to be the regular courſe. but ſometimes a commiſſion of appraiſement and ſale directly follows the firſt decree, and in Ireland has uſually, though irregularly, followed the defaults, and been granted on the ſummary petition without any firſt decree; and in England we find from late reports, that inſtances have happened where ſhips have been ſold under the firſt decree, without any application to the court; but this was juſtly reprobated as a ſtep totally irregular and unauthorized by that decree (10).

The proceeds of the ſale being brought into the

(10) Caſe of the Exeter, 1 Robinſon's Reports, 174.

regiſtry, the court exerciſes its diſcretion over them, giving priority where there are various ſuitors, according to precedence in commencing the ſuit, or perhaps according to other circumſtances, and decreeing the produce over and above the principal demand of the promovent's, to be paid over to the true owner, ſaving the demands of any perſons legally intervening in the cauſe pro intereſſe ſuo.

It is very uſual for the impugnant, or ſome other perſon intereſted, to come in while the defaults are running, or after they are all incurred, or even within a year after the firſt decree obtained; and on giving ſecurity and paying all coſts, to be admitted to defend. If the ſhip or goods are in a ſtate of decay, or of a periſhable nature, the court is uſed, during the pendency of the ſuit, or ſometimes after ſentence, notwithſtanding an appeal, to iſſue a commiſſion of appraiſement and ſale, the money to be lodged with the regiſtrar of the court, *in uſum jus habentis.*

We have hitherto conſidered ſuits againſt the ſhip for ſome debt, or thoſe founded in its hypothecation: a poſſeſſory ſuit to recover a poſſeſſion which has been by ſome means illegally ouſted, detained, or taken away, is of a different nature in its origin and object, but the proceſs is the ſame as above deſcribed. If no perſon appears to defend after a citation has iſſued to the detainers of the ſhip in particular, and all others

in general, the defaults go on in the ſame courſe, and the ſhip is condemned in pain of the contumacy of the perſons cited to the promovent, not in ſatisfaction of a debt, but as his poſſeſſory right (11).

Let us now ſuppoſe that ſome perſon cited or intereſted, as the maſter or owner, or occupier, claiming right of poſſeſſion therein, appears and defends the ſhip, he will either appear under a *proteſt*, or abſolutely.

In the former mode, the party appears proteſting that he doth ſo only to ſave his contumacy; and that, for reaſons ſet forth in the proteſt, he is not bound to anſwer; as for inſtance, that he is ſued as owner, although he never was owner, but only a broker;—or that he is ſued for wages by a mariner who never was on board his ſhip,—or that he is ſued for ranſom money exceeding the value of a ſhip and cargo, which he has offered

(11) Clarke extends this practice alſo to petitory cauſes, or thoſe in which a right of property is diſcuſſed, but ſuch are not now by this court entertained.

Of poſſeſſory cauſes, inſtances have been given in a preceding chapter, as where a former proprietor claims poſſeſſion of a ſhip captured by the enemy, and purchaſed by a neutral, without a legal ſentence of condemnation; but as this caſe appears to me to belong to the prize court, I rather prefer the inſtance of part owners praying poſſeſſion to be decreed from the others to a ſhip's huſband, by them appointed for their uſe, when their partners have wanted to carry the ſhip to ſea againſt their will.

to abandon (12), which aſſertions he ſupports by affidavits and exhibits, and deſires to be diſmiſſed. To this the promovent replies by allegations, contradicting thoſe of the proteſter, and further alleging that his appearance under proteſt, is in no reſpect agreeable to law and the known practice of the court, the matter by him ſet forth being to be introduced in no other way than by plea and proof, wherefore he prays the judge to reject his petition, to be diſmiſſed, and to aſſign him to appear abſolutely.

If the proteſt be over-ruled, he then appears abſolutely by himſelf, or his proctor lawfully conſtituted. Whenever a perſon thus appears abſolutely (13), a fidejuſſory caution or ſecurity is en-

(12) This was the ſubject of the proteſt in Yates and Hall, a remarkable caſe, as to which, ſee 1 Term. Reports, p. 79.

(13) The following rules of court, in two ſeveral cauſes, where there had been an appearance for the ſhip, will beſt illuſtrate the text, as to the practice in ſuch caſes:

A. *againſt the Ship* B. *whereof* F. G. *is Maſter.*

The maſter intervened for his intereſt.

Bail given to anſwer the arreſt.

Promovent aſſigned to libel with ſureties on the next court day. Impugnant aſſigned to bring in mariners' contract, and ſhip's books at ſame time.

Promovent aſſigned that he had given bail to proſecute, and then gave in ſummary petition.

Mariners' contract and ſhip's books brought in. Promovent aſſigned to prove by firſt ſeſſion of next term.

tered into by *fidejuſſors*, or ſureties, to the three effects already mentioned when treating of the

Aſſignation to prove continued.

Promovent prayed publication, and cauſe to be heard ſummarily.

Another Cauſe againſt the Ship D.

September 3d. Warrant returned, Proctor appeared for impugnant. Prayed that promovent ſhould libel with ſureties; and ſo decreed. Impugnant to bring in mariners' contract and ſhip's papers.

September 18th. Sureties given by promovent. Ship's papers brought in. Promovent filed a libel. Witneſſes produced.

October 23d. Witneſſes produced. A commiſſion of valuation which had iſſued, returned and confirmed. Publication decreed, unleſs cauſes.

November 2d. Promovent ſtayed publication, by praying to be reſtored to a term probatory upon an affidavit, for liberty to produce more witneſſes: granted. And an attachment, unleſs cauſe, granted againſt a witneſs who diſobeyed a citation to appear ſerved on him by the marſhal.

November 6th. The refractory witneſs appeared. The impugnant exhibited a matter peremptory and defenſive. Promovent to anſwer next court day.

November 10th. Promovent admitted the ſaid matter peremptory as far as, &c. &c. and conteſted the reſt negatively. Promovent's perſonal anſwer to ſaid matter peremptory, prayed and decreed.

September 21ſt. The court admitted Promovent's libel as far as by law admiſſible, and aſſigned the ſame to be proved. The perſonal anſwer of impugnant was prayed and decreed.

September 25th. Impugnant ſworn to give in his perſonal anſwer.

practice of the civil law:—*Judicatum ſolvi*, to pay the condemnation or ſum decreed, as alſo the coſts which ſhall be adjudged. *De judicio ſiſti*, to appear from time to time, and at the hearing, and abide the ſentence. *De rato*, to ratify the acts of his proctor. In this ſtipulation the ſureties, and the party by his ſureties, expreſsly ſubmit to the juriſdiction of the court, and conſent, in caſe of default in the performance of the conditions, that the admiralty proceſs ſhall iſſue againſt them. This ſtipulation, though in the nature of a recognizance, differs from the ſecurity uſually ſo

October 5th. Rule, that impugnant ſhould be attached for his contempt in not having given in his perſonal anſwer, unleſs cauſe, next court day.

October 9th. Perſonal anſwer given in; then impugnant offered to bail the ſhip, and prayed a commiſſion of valuation, that he might bail her purſuant to this valuation. Decreed, and commiſſioners named, two by each party.

Two witneſſes produced ſame day to promovent's allegation, and alſo ſworn to interrogatories.

November 20th. Promovent prayed that impugnant ſhould be reſtrained to a time of proving his matter peremptory. Court limitted him to a fortnight. Promovent's perſonal anſwer given in.

December 12th. Publication, unleſs cauſe, next court day.

December 17th. Publication paſſed.

January 24th. Being the firſt day of the next term, the judge aſſigned to proceed ſummarily, and to inform next court day.

January 28th. Information and ſentence.

termed; it ſubjects the perſons and goods of the ſtipulators, but it doth not enable the admiralty to iſſue proceſs againſt their lands. It muſt alſo be obſerved, that the bail are not liable beyond the extent of this ſidejuſſory caution, and that the ſecurity doth not affect them in a court of appeal, where the impugnant muſt get freſh ſidejuſſors, (14).

Where the ſhip is ſeized, it ſeems reaſonable that if the demand doth not exceed the value of the ſhip, the impugnant appearing for his intereſt ſhould not be obliged to give ſecurity for more than the coſts that may be incurred; and in all caſes the impugnant is at liberty to object, that the promovent has malicioufly laid his action at a ſum greater than can poſſibly be due, in order to prevent his procuring bail, in which caſe the judge may inſiſt on the promovent's oath, as to the ſum which he really believes to be due (15).

The impugnant having appeared ſpecially, or intervened for his general intereſt, and given bail to anſwer the arreſt, then by his proctor calls upon the promovent to libel with ſureties by the next court day, otherwiſe to be diminiſſed with coſts. This the promovent accordingly muſt do. After

(14) Clarke's Praxis. Note to title 59. Fifth edition amended.

(15) Clarke's Praxis, tit. 12. This ſeems now to be made unneceſſary, by the late rule requiring an affidavit of debt before the warrant iſſues.

the impugnant has given bail, his ſureties being bound to the proſecution of the ſuit, to pay coſts if the party be defeated in the cauſe, and to produce the promovent in judgment whenever required (16).

At the ſame time that the ſecurities above-mentioned are entered into on each ſide, the principal parties reſpectively are to enter into cautions in double the ſum in which their ſureties are bound (or at leaſt in a larger ſum, according to the diſcretion of the judge), theſe cautions being to the ſame effect with the ſtipulations entered into by the ſureties, except as to an additional clauſe indemnifying theſe ſureties (17).

If either of the parties make it appear upon oath that he is unable to find ſureties, he may, at the diſcretion of the court, be admitted to the juratory caution (18).

Stipulations, as we have ſeen, were in the civil law prætorian and judicial, or conventional, made to the court or to the party (19). This diſtinction is material, on account of the different effects which they produce. When the ſtipulation is prætorian, if one of the ſureties die, new ſecurity muſt be given: otherwiſe, when conventional.

(16) Clarke's Praxis, tit. 14.

(17) Ibid. tit. 18.

(18) See ante the practice of the civil law.

(19) See the chapter on Title by Contract in the firſt volume.

the caution given to the court it has power, and may remit part, or adjudge a reaſonable part to the promovent, and diſpoſe of the reſt at his diſcretion; but it has no ſuch power over the conventional. The ſtipulations of which we have now been ſpeaking are *conventional*. In proceedings againſt the perſon, the caution for his appearance is prætorian. In theſe conventional ſtipulations, the ſureties may be proceeded againſt, though the principal be dead, for they are ſued as principals, (20).

Theſe ſtipulations in England are not under ſeal, from fear of prohibition. In Ireland, they uſually have been ſealed. They affect body and goods, but not the lands.

If either party be diſſatisfied with the bail or ſecurity offered by the other, or finds in any ſtage of the cauſe that the bail(21), though at firſt ſufficient, are *lapſi facultatibus*, he is to make his objections to the court, which will examine into them, by looking for the plaineſt, ſimpleſt, and moſt ſummary proof, and if it thinks neceſſary order freſh ſecurity to be given. If the bail are ſufficient, the ſhip is uſually releaſed, and ſuffered to proceed to ſea.

(20) See 1 Salkeld, p. 34.

(21) Theſe ſtipulations are not diſcharged by ſurrendering the principal, as bail are by our common law; for the fidejuſſors are abſolutely bound, and were ſo by the civil law, *judicatum ſolvere*, to pay the coſts and condemnation at all events.

The promovent having libelled with ſureties, the cauſe proceeds exactly like a *ſummary* cauſe in the eccleſiaſtical court. All cauſes in the admiralty court are *ſummary* (22). *Clarke*, therefore, in his practice, refers entirely to the proceedings in the eccleſiaſtical courts, as to theſe ſubſequent ſtages of the cauſe, a liberty for which I might plead ſome excuſe alſo (23); but it ſeemeth more adviſable to give here a brief delineation of the principal ſteps to be purſued, *taking our direction, where Clarke is ſilent in his admiralty practice, as he has directed us, from the proceedings of the eccleſiaſtical courts.*

(22) The diſtinctions between plenary and ſummary cauſes are well known. It is familiar alſo to the common or at leaſt to the ſtatute law. *Plenary* are thoſe cauſes in which the order and ſolemnity of the law are exactly obſerved. There is a formal *conteſtation of ſuit*, a regular *term to propound*, and ſolemn *concluſion* of the acts; and if there is the leaſt omiſſion or infringement of the regular order, the whole proceedings are annulled. *Summary* are thoſe in which this order and ſolemnity are diſpenſed with; the ſuit is, *as it were*, conteſted, by the next contradictory act after the libel put in that concerns the merits of the cauſe. Such as the diſſent of the proctor—the *ſecond aſſignation* to hear ſentence ſupplies the place of *concluſion*—there is no aſſignation to propound, nor expreſs concluſion—in ſhort, *omnia ſubſtantialia judicii ſunt ſublata*. Sometimes even the libel and all the proceedings may be viva voce.

(23) As having given a clear ſketch of the practice of the eccleſiaſtical courts in another work on eccleſiaſtical law.

The libel being filed with all due circumſtances, the next ſtep is the giving in of impugnant's anſwer. This may be a general confeſſion, in which caſe he is ſaid to conteſt the libel affirmatively; or a general denial, in the nature of a plea of the general iſſue, which conteſts it negatively: or the libel may be oppoſed by exceptions, or matters defenſive, and after being anſwered in ſome of theſe ways (any of which modes of anſwering in a ſummary proceeding amount to or are taken for conteſtation of ſuit, or in lieu of it) (24).

If the impugnant neither confeſſes the promovent's libel, nor conteſts it negatively, i. e. doth not plead the general iſſue, he probably then puts in an exception, which may be either *peremptory* or not: if it perempts the ſuit, it muſt do ſo either for cauſe apparent on the face of the libel, or for cauſe firſt appearing in the exception itſelf. In the former caſe it anſwers to a general demurrer—in the latter, to a ſpecial plea in bar.

If it doth not perempt the ſuit, but excepts for the defect of form in the promovent's pleading, or from matter ſet forth in itſelf, but not amounting to a bar, it anſwers in the firſt place to a demurrer for want of form; in the latter, to a plea in abatement. But ſtill to all theſe various pleadings the civil law has aſſigned only the general name of exception, with a diſtinction into thoſe dilatory and thoſe peremptory.

(24) See the ſtrict meaning of conteſtation of ſuit, in the chapter on the Practice of the Civil Law.

If the impugnant's plea doth not merely exclude the promovent's action by a legal objection, ſuch as that of a former deciſion on the ſame point between the ſame parties, but ſets up a defence on the merits, ſhewing that he has no cauſe of ſuit, this is by the civil law, as we have ſeen, termed *defenſio*, a defenſive matter.

To the plea of the defendant, defenſive or exceptive, the promovent may reply in various ways, as the caſe may require, e. g. by conteſting the admiſſibility of his adverſary's exceptions, which may be compared to joining in demurrer; by conteſting it negatively, if it was in the nature of a plea in bar; or by putting in to it a peremptory exception, which is as a demurrer; or perhaps by ſpecially replying, though ſuch ſpecial replications are not frequent. The promovent poſſibly may rejoin by a pleading called a duplication; and in the old Roman law we find mention alſo of triplications and quadruplications, names formerly uſed in the Engliſh law (25), inſtead of rebutters and ſurrebutters.

We have hitherto conſidered the promovent as filing but one libel, and the defendant but one plea, and in fact they can file no more; nor do the books of practice take notice of any others:

(25) To go beyond a duplication was reckoned bad pleading; and it is ſaid in a note on title 19 of Clarke's Practice, that in the admiralty of Holland a duplication is not allowed.

but additional allegations (26) may be put in, not charging new or diſtinct cauſes of ſuit or grounds of defence, but only new circumſtances or additional facts in ſupport and confirmation of the original pleadings. Theſe muſt be reſtrained from running to exceſs (27) by the diſcretion of the court.

Each party is entitled at any time, even down to the hearing of the cauſe, to demand the anſwer of his adverſary upon oath to every one of his pleadings: a manifeſt advantage in the practice of this court over that of courts of equity, where

(26) Allegation *en termes de Palais* eſt la citation d'une autorité d'appuyer une propoſition.—Encyclopedie of Diderot & D'Alembert, Paris, 1751.

Allegationes partium—rationes quas reus & actor producunt; hinc nata noſtris vox familiaris *alleguer* de eo qui inſtrumenta vel teſtes vel rationes pro ſuo jure tuendo profert.—Du Freſnes' Gloſſary.

The word comes not from *allegare*, which is *ad alium mittere*, but from *alligare*, i. e. *ad ligare*, to tie or annex to.

(27) Eſt et alius modus refrænandi has *ſecundas* & aliquando etiam *tertias* & *quartas* propoſitiones materiarum ſive allegationum, ſays Oughton, note on title 112. The two methods appear by that and the following ſection: 1ſt. Petendo expenſas retardati proceſſus. 2d. Aſſignando terminum *infra quem* ad amputandas dilationes, ſi multiplicentur allegationes. He here ſpeaks of the number as only limited by the diſcretion of the court, or in conſequence of ſome rule ſerved upon the oppoſite party. In the eccleſiaſtical courts it is uſually confined to three.

this benefit is confined to the plaintiff, unleſs the defendant has ground for filing a croſs bill.

If the party decreed and cited to give in a perſonal anſwer doth not obey that citation or order, a citation viis & modis iſſues; and if he ſtill continues contumacious, a citation goes againſt the bail or ſureties to produce him, which if they do not do, nor appear to make excuſe, proclamation being thrice made for them, they are to be declared contumacious, and a decree made to apprehend them perſonally.

If the party appear, he is ſworn to give in his perſonal anſwer before a day aſſigned, which if he omits to do, he will be attached (28), and Clarke ſays may be liable to fine and pecuniary penalties. But this is not a court of record. Exceptions may be put in to theſe perſonal anſwers, as to an anſwer in chancery.

(28) The text will be illuſtrated by the following extract from rules in a cauſe:

2d Seſſion, Eaſter term. Decree for anſwers and compulſory.

3d Seſſion. Decree for anſwers returned, and certificate continued to next court day.

1ſt Seſſion, Trin. term. He appeared to decree for anſwers.

31ſt *July*. Impugnant decreed to be attached for not anſwering.

2d Seſſion, Michaelmas term. Impugnant produced for his anſwers. His proctor undertakes to pay the contumacy fees. He is ſworn and admitted to give in his anſwer.

The parties who are not ſufficiently relieved by the perſonal anſwers of their adverſaries, muſt proceed to proof by witneſſes and inſtruments. And here, as Clarke refers us entirely to the practice of the eccleſiaſtical courts, with ſome ſmall variation by him pointed out, it is my buſineſs to point out what that practice is as to proofs and depoſitions.

The pleading being filed, a term probatory is granted, within which witneſſes are to be produced, which by the courſe of the court lapſes, or is terminated on the next court day. This is thrice repeated, ſo that the three probatory terms would by the ſtile of the court lapſe on three ſucceſſive court days, if they were not continued, which they almoſt always are, on the proctor's prayer, for ſuch a reaſonable ſpace of time as is neceſſary for the examination of the witneſſes, until the oppoſite party or the judge object to any unreaſonable delay. Theſe continuances are abſolutely neceſſary, ſince in ſcarce any inſtance would it be poſſible for the party to bring up witneſſes perhaps living at a great diſtance, nor for the examiner to examine them within the ordinary curial terms.

The term probatory is common to both parties, i. e. each may examine during the time granted to the other, and as long as it continues; and there are three terms probatory granted on each of the allegations or pleadings, which either party is at liberty to file; during which terms probatory each

party is at liberty to produce witneſſes, not only to the matters contained in the laſt allegation filed, but alſo to thoſe in all the preceding allegations; ſo that until publication, and as long as any term probatory is in exiſtence, the whole cauſe and all the contents of all the allegations are open to proof.

If the party who prayed the term probatory is delayed by want of the perſonal anſwer of his adverſary, the term probatory runs only from the time of that anſwer coming in; and though it may have lapſed, yet for ſpecial cauſe the party will be reſtored to a term probatory by the court: on the other hand, if the party obtaining it ſhould afterwards change his mind, and think it unneceſſary to examine further witneſſes, he may renounce it, except it has been granted in pain of the opponent's contumacy who abſents himſelf, or except the other party has accepted it, and proteſted of uſing it as common to both, unleſs he ſo accepts it merely for delay, and afterwards doth not examine witneſſes, in which caſe he muſt pay coſts of proceſs retarded.

If the witneſſes appear, they are ſworn (under a penalty, as Clarke ſays) to undergo their examination: if they do not appear, a compulſory proceſs iſſues to make them appear; or if they cannot be ſerved perſonally, a decree or citation viis & modis, and if that be not obeyed, a warrant for their perſonal apprehenſion.

The probatory term is naturally continued by the contumacy of the witneſſes to give time to ſubdue it; but if the judge has reaſon to think that their abſence is the effect of any colluſion or trick to delay the cauſe, he may proceed to the aſſignation for ſentence; but yet if they afterwards appear before ſentence, and purge their contempts, they may be examined by leave of the court.

The witneſſes, not contumacious, are produced in court within the probatory term, and ſworn; or if at a diſtance, a commiſſion iſſues to examine them (29). On their production, Oughton gives particular directions about the adverſaries diſſenting to their production, and proteſting of its nullity, which in practice is not now done, the adverſary merely ſwearing them to give true anſwers to his queries, in caſe he means to croſs-examine them. Oughton ſays, that the judge admoniſhes them to appear to be examined before the next court day, or within ſome competent time, but neither is that the modern cuſtom (30). The party producing them gives notice to the opponent of the articles of his libel, to which he intends to examine them.

(29) Oughton ſays in a note, title 80, though the witneſſes muſt be *produced* within the probatory term, they may be *examined* after it has lapſed, and ſo is the practice. All that is neceſſary is to produce them within the time.

(30) The court uſually admoniſhes them, that they muſt attend the examiner of the court to be examined, and that the examiner will give them due notice of the time.

The witneſſes produced becoming thereby common to both parties, the adverſary may adminiſter to them interrogatories, which he muſt do within twenty-four hours, unleſs further time be granted (31). A copy of the interrogatories, according to Oughton, is not to be given to the opponent, and this croſs-examination doth not preclude objections to the witneſſes (32). The party producing them cannot impeach his own witneſſes, inſomuch that though he may afterwards chuſe to wave their examination, yet he cannot prevent the oppoſite party from croſs-examining them.

The witneſſes are to be ſecretly and ſeparately examined, not in the preſence of the parties or other witneſſes. Their depoſitions, after being read over to them article by article, and they aſked whether there be any thing which they wiſh to alter or amend (33), are then to be ſigned by the witneſs, and he afterwards *repeated* before the judge, i. e. aſked again in the open court by the

(31) Each party of courſe may read the evidence given by his witneſſes, as well as thoſe of his adverſaries, on their croſs-examination.

(32) i. e. As I conceive to their ſayings, for I apprehend he cannot afterwards object to their perſons. Oughton thinks that interrogatories more frequently prejudice than aſſiſt the party offering them.

(33) How much is this preferable in ſome reſpects to an examination at niſi prius, where every incautious or haſty impreſſion is inſtantly bellowed to the jury, and inſiſted upon, without giving time to the witneſs to correct a particle, or if he attempts to do it, perjury or prevarication is immediately charged on him.

judge, whether there be any thing which he wiſhes to correct or alter. This is indiſpenſably neceſſary, becauſe though the examination is before the examiner, it is always preſumed, ſays Oughton, to be in the preſence of the judge.

If the witneſſes, through illneſs, impriſonment, age, or infirmity, are incapable of attending, although reſident, the judge, or his ſurrogate, or I ſuppoſe the uſual examiner, may attend and examine them at their own houſes; and if they live at a diſtance, they muſt be examined by commiſſion proceeding from the judge, if they are within his juriſdiction; otherwiſe letters requiſitory muſt go to the judge within whoſe juriſdiction they reſide, requeſting him to examine, or have them examined, as it is called, *ſub mutuæ viciſſitudinis obtentu*, from the mutual aid thus granted by theſe ſeveral juriſdictions; or commiſſions be granted to foreign parts for the examination of witneſſes.

I ſhall firſt conſider commiſſions iſſuing within the juriſdiction where the cauſe ariſes. Theſe commiſſions iſſue to ſuch perſons as the judge may pleaſe, uſually the examiner's deputy examines, or other officers or appointees of the court, empowering them jointly and ſeverally to ſit and examine, at an appointed time and place, aſſuming to themſelves an actuary, i. e. a regiſter, properly among the notary publics, with a term aſſigned for tranſmitting or returning the commiſſion, and the term probatory is to be continued

until the day of the return, and proper notice (34) given to the oppoſite party of the time of opening and proceeding on the commiſſion.

Examiners are ſometimes nominated by the parties, a practice which Oughton himſelf obſerves, is fraught with many miſchiefs, inaſmuch as the commiſſioners ſo nominated will naturally make themſelves parties, and be in danger of not examining indifferently, and deviating into perpetual conteſts (35). The wiſdom therefore of eccleſiaſtical judges has taken a hint from the ſuggeſtions of Oughton, and commiſſions are now uſually in thoſe courts directed but to an officer of the court; and the proctor of either party, if he chuſes to have the commiſſion attended, muſt do ſo either in perſon, or by a ſubſtitute, who muſt be a proctor (36).

Now that an officer of the court examines, who is probably a notary public himſelf, it is often thought unneceſſary to aſſume an actuary.

The oppoſite party may join in the commiſſion

(34) Which is three days, according to Oughton.

(35) Partes ſolent nominare commiſſarios ſibi amiciſſimos, & ita communiter non dicuntur commiſſarii *judicis* ſed *partium*; & gerunt ſe ut *partes*, tit. 86. ſec. 8. and read his note to the ſame ſection.

(36) A proctor can here appoint a ſubſtitute. Strictly ſpeaking, a proctor cannot appoint a ſubſtitute till after conteſtation of ſuit, when conteſtation of ſuit is neceſſary. This means, however, where he has no ſpecial authority for ſo doing; but uſually in their original ge-

to ſave expence, and examine his own witneſſes under the ſame. When the commiſſion goes down he may adminiſter interrogatories, or if he does not chuſe by his proctor to be preſent, he may, at the time of ſpeeding the commiſſion, deliver in his interrogatories to the regiſter, not to be ſhewn to any perſon until the commiſſion be opened; but if afterwards he chuſes to be preſent by his proctor, theſe interrogatories may be ſubſtracted, and new ones adminiſtered: If no interrogatories be previouſly prepared, he uſually gets a reaſonable time from the commiſſioners below to prepare and bring in interrogatories, having only twenty-four hours in ſtrictneſs.

If the adverſe party doth not appear at the time of ſpeeding the commiſſion, he is to be thrice publicly called, and every thing is to be done in pænam contumaciæ, *in pain* of his contumacy; and Oughton thinks, that if he doth not chuſe to be preſent, he ought to take care at the time of granting the commiſſion, to proteſt of nullities, for that otherwiſe he cannot afterwards, except againſt the witneſſes. Tit. 86. ſec. 11.

The certificate of the execution of the commiſſion is to be directed to the judge, ſubſcribed

neral proxy, they have ſuch a ſpecial clauſe empowering ſubſtitution *ab initio*.

If the proctor diſobeys ſuch an order of the court as above, he may be ſuſpended; and it is to be noted, that a proctor of doctors commons ſuſpended, cannot have a mandamus to reſtore him. See 3 Bacon's Ab. 531. and Burn, title Proctor.

and ſigned by the perſons appointed to expedite the commiſſion, and containing all the acts done by virtue thereof. Every leaf of the depoſitions ſhould be ſubſcribed not only by the witneſſes, but alſo by the commiſſioners, and the whole carefully ſealed up with an authentic ſeal, until produced in the court from whence it iſſued, and aperture there prayed.

If the commiſſion is to be executed in foreign parts, it may perhaps be directed to the principal magiſtrate of the place, or his deputy; and in ſuch caſe, as it is difficult to aſcertain the exact time, the commiſſion may be more indefinitely directed to be executed between ſuch a day and ſuch a day, giving due notice a certain number of days before to the oppoſite party.

PUBLICATION.

Whenever the proctor of either party doth not intend to produce or examine any more witneſſes, he may pray publication, which ſometimes on ſpecial circumſtances is prayed, ſaving the examination or repetition of ſome particular witneſs. Publication may be ſtayed on ſufficient cauſe at the prayer of the oppoſite party, and putting in a new pleading upon his part (if the whole number allowed him be not out) is always ſufficient cauſe, and ſtays it of courſe; ſo that where each party chuſes to put in their three pleadings, and are ready with them, publication cannot paſs till they are all exhauſted, and the witneſſes to them

examined; but the party which prays to ſtay publication, muſt be ready with his pleading at the time it is prayed; it is for the court to determine whether publication be unreaſonably or deſignedly delayed, or commiſſions tediouſly or improperly executed, and to act accordingly.

Publication having paſſed, and copies of the depoſitions being given out, if the witneſſes have not fully anſwered to interrogatories, the court will oblige them to anſwer more fully; if other exceptions appear to the teſtimony, the parties will offer them. Theſe *exceptions to witneſſes* are either general or ſpecial; the former offering general objections, the latter ſpecifying particular facts, cauſes, and reaſons of exception; and each of them may be to the *perſons*, as that they are of infamous character, or to the *ſayings*, that they are contradictory, repugnant, or *extra-articulate*; and the party may, ſaith Oughton, demand the oath of calumny or malice from him who excepts generally, to oblige him to ſhew that he doth not except for the ſake of delay.

Probatory terms are granted on theſe exceptions, and commiſſions to examine as in the principal cauſe.

The party to whoſe witneſſes exceptions are made, may bring others to *corroborate* them, and may alſo impeach the witneſſes produced to ſupport the exception, who are called *reprobatory* of the original ones, by others *reprobatory* of them, but the conteſt can go no further, according to

the adage—*In teſtem teſtes, & in hos ſed non datur ultra.*

The party excipient may corroborate his witneſſes alſo, but corroboration cannot aid thoſe to whom ſpecific objections have been put in (37).

Exceptions to witneſſes, if any, being diſcuſſed, the cauſe is now ready for hearing; but even at, or after this ſtage, one ſpecies of evidence is ſtill admiſſible, that of ſuch ſolemn inſtruments and written documents in which there is no danger of perjury, and which, though if alleged in the libel, they ought to be produced before conteſtation of ſuit (or the act, whatſoever it be, which in ſummary cauſes is ſubſtituted for it); at all events before the ſecond aſſignation; yet are ſometimes permitted to be produced and proved as exhibits even at the hearing.

If theſe inſtruments are in foreign languages, perſons ſkilled in thoſe languages are to be ſworn as interpreters, and a copy of their tranſlation, oath being made of its fidelity, lodged with the regiſter (38), as proof.

Publication having paſſed, the judge aſſigns to hear ſentence, and to inform; and of theſe aſſignations, to hear ſentence in ſummary cauſes,

(37) Oughton, note to title, 102.

(38) Clarke ſeems here a little inconſiſtent. He makes the proctor then pray that the original may be re-delivered; and yet he ſays, it ought to remain in the power of the regiſter.

there are properly and ſtrictly two; the ſecond correſponding to concluſion in plenary cauſes, and precluding the admiſſion of all further evidence, without ſpecial licence obtained from the judge. Indeed, in cauſes heard ſummariſſime, as are ſometimes ſuits for ſeamens wages, they are, ſometimes after publication, ordered at once to be heard ſummarily next court day. And indeed in ſome of their ſuits, when trifling, there is no publication, witneſſes being only examined viva voce at the hearing; and it is ſaid in a note on title 19 of Clarke's Practice, even that their petition need not be in writing, though it uniformly is ſo.

After the ſecond aſſignation is paſſed, the judge receives information by hearing the evidence read, and the arguments delivered by the advocates, and then proceeds to pronounce definitive ſentence.

We have thus far conſidered the ſuit carried on directly between two parties, but it may become alſo incumbent on a third to intervene for his intereſt during their controverſy. This he may do either as a creditor having ſome ſuperior claim, or as the real proprietor, or legal poſſeſſor of the thing in queſtion, alleged by promovent to belong to, or to be unjuſtly detained by the impugnant. The intervenent muſt give ſecurity by fidejuſſors, to ratify the acts of his proctor, to appear in judgment (39), and for coſts, if decreed againſt him. If he intervenes after the firſt decree ob-

(39) Not *de judicato ſolvendo*, as is evident.

tained, he muſt pay the coſts of that decree; and the proctor of promovent being then *functus officio*, he muſt cite the promovent himſelf, if he be alive, otherwiſe his ſureties, to ſhew cauſe, if they can, why intervenent ſhould not be allowed to propound his intereſt. If promovent doth not appear, a warrant is obtained to attach and arreſt him.—If he doth appear, the intervenent propounds his intereſt, and proceeds as parties proceed in ordinary cauſes.

If the intervention be before the firſt decree obtained, the promovent may, notwithſtanding, proceed againſt impugnant, and if he doth not appear, go on with the proceſs for defaults, and obtain the firſt decree, but poſſeſſion of the goods is not to be delivered to him, pending the ſuit between him and the intervenent.

Sentence and Execution. When the cauſe has been heard, and the judge is ready to pronounce ſentence, a citation iſſues to the party to ſhew cauſe, if he can, within a limited time, why the ſentence ſhould not be paſſed, and execution of it commanded, and to hear the ſentence. At the time appointed, ſentence is given, a ſchedule of the coſts is then porrected, which the judge taxes, appointing a certain time within which they are to be paid. If after a public edict iſſued, the defeated party will not appear, the bail or ſide-juſſors are moniſhed, and obliged to perform the decree, to pay the coſts, and ſometimes, if the party live out of the kingdom, or has no fixed

domicile, the fidejuſſors are moniſhed in the firſt inſtance.

We have hitherto conſidered the practice in ſuits againſt ſhips and goods, by creditors claiming a lien thereon, or inſiſting upon hypothecations thereof made to them, ſetting up a poſſeſſory right to the ſame, or proceeding againſt the ſame for colliſion and damage. We proceed now to mention cauſes depending on claims or queſtions of property.

Petitory Suits, or Cauſes of Property. It has been repeatedly obſerved in the courſe of this work, that the court of admiralty doth not at preſent pronounce directly on queſtions of ownerſhip, and that where a queſtion of property is concerned, it has long ceded its juriſdiction to other courts, and will not entertain a queſtion of property, unleſs incidentally ariſing (40), and in ſuch a manner as is not diſputed between the

(40) See the caſe of the Aurora, 3 Robinſon's Reports, p. 133. where the court refuſed to try the caſe, there not being a right of property ſufficient to induce the court to proceed upon it, as in a caſe of poſſeſſion; and in that caſe Sir W. Scott ſays, it was held down to no very diſtant period, to be within the juriſdiction of this court, to examine and pronounce for the title of ſhips, or queſtions of ownerſhip. The court now is very cautious not to interfere in queſtions of this nature, being ſome time after the reſtoration informed by other courts that it belonged excluſively to them. It appears from 1 Shower, 179, that pleas of property were then admitted in the inſtance court, as they ſtill may.

parties, and then it can hardly be ſaid to judge on the matter of property as a queſtion. However, as the court did entertain ſuch queſtions until after the reſtoration, and in not doing ſo may be ſuppoſed to ſubmit rather to authority than reaſon, I might be accuſed of executing my duty imperfectly, did I omit to mention ſome rules regarding practice in petitory cauſes, laid down by Clarke and others.

When petitory cauſes were admitted, if the party in a poſſeſſory cauſe perceived from the inſpection of the proofs therein, that he had no proſpect of ſucceſs in the queſtion of property, he might decline the conteſt, but his adverſary, for the better confirmation of his title, might proceed in the petitory, and obtain final ſentence therein. But if he did, he muſt libel anew, and produce freſh proof, unleſs the evidence of the witneſſes produced in the poſſeſſory had extended to a proof of property. On the other hand, the party defeated in the poſſeſſory cauſe might proceed poſſibly with ſucceſs in the *petitory*, in which the proceedings were ſimilar to thoſe in other maritime cauſes. And ſureties were to be given by the ſucceſsful party in the poſſeſſory, for reſtoring the goods, if there ſhould be a decree againſt him in the petitory, at leaſt if the defeated entered a proteſt that he intended ſo to proceed (41).

(41) The ſecurity alſo went to ſtand the ſentence, pay coſts if decreed, and ratify his proxy; and the promovent

Colliſion Caſes. The practice in ſuits againſt the ſhip itſelf, in caſes of tort or damage, ariſing from the colliſion of ſhips, doth not, in any obſervable reſpect, differ from the practice in any other ſuit againſt the ſhip, either where the proceeding is by default, or where ſome perſon appears for the ſhip, and his intereſt.

Proceedings in Perſonam.

A warrant goes in the name of the king (42), directed to the marſhal and his deputy, empowering and charging him to arreſt, or cauſe to be arreſted, *the perſon*, and him ſo arreſted to keep under ſafe and ſecure cuſtody, ſo that he be forthcoming before the court to anſwer in a maritime cauſe.

If the warrant is to be executed within twenty miles of the capital, the marſhal himſelf is to execute it; if further, the party acting as his deputy. The warrant is to be ſhewn, and the cauſe of arreſt told to the impugnant, who will be then detained in cuſtody, till he gives a ſufficient fiedejuſſory caution, which, according to

in the petitory cauſe gave fidejuſſory caution to the ſame effects, and alſo to proſecute his ſuit, I conceive in the prize court. See Browne's caſe, 1 Salk. 32.

(42) Clarke ſays it ſhould be in the name of the lord high admiral, directed to all juſtices, &c. &c. and eſpecially to the marſhal, and that the regiſter iſſues it of courſe, without the judge's order.

the courſe of the court ſhould be five hundred pounds. The warrant is then to be returned, with a proper certificate of its execution.

If the impugnant doth not appear, he is pronounced contumacious, and a freſh warrant iſſues to take him, and the judge may allot ſome part of the ſecurity to the promovent to compenſate his coſts, and if he ſees meet may remit the reſt (43); but if it appear that the impugnant has fled the kingdom, and cannot be taken, the whole ſum in the ſecurity or ſtipulation is to be adjudged to the promovent (44).

If the impugnant appears, and the promovent abſents himſelf, the latter is to be publicly thrice called (45); and then if he doth not appear, the judge may at his diſcretion give ſentence on the ſame day, or expect him to another court-day, or which is moſt uſual, appoint a day at a competent diſtance, on which if he do not appear, the impugnant ſhall be diſmiſſed with his coſts; and if the impugnant thinks it probable that the promovent will appear that day, it is adviſable for him previouſly to introduce his own ſureties.

(43) This extraordinary doctrine I never heard of in practice. The reaſon given in the notes on Clarke is, that the ſtipulation is prætorian, i. e. the caution or *ſecurity* is given to the admiral, not to the party, and if forfeited, is forfeited to the former.

(44) Clarke, tit. 9.

(45) Clarke ſays oddly, by the *marſhal*.

When the party appears he is to give new ſureties (for the firſt were only bound for his *appearance*) unleſs on account of poverty he be admitted at the judge's diſcretion to the *juratory* caution (46); otherwiſe to remain in priſon (47).

The ſubſequent ſtages in the proceedings in ſuits againſt the perſon *merely and directly*, do not appear to me to differ from thoſe againſt the perſon where he comes in *collaterally* (i. e. not to defend himſelf, but his ſhip, the original and direct action having been *in rem*), and therefore I think it unneceſſary here to repeat them.

Let us laſtly ſuppoſe that the perſon againſt whom a warrant has iſſued cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an eaſy and ſalutary remedy, though, according to Huberus (48), not authorized by the example of the civil law; they were analogous to the proceedings by *foreign attachment* under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance. By this means, if a foreigner owed money in England, and any ſhip of his came into a Britiſh har-

(46) This, obſerves the note on Clarke, is contrary to Farinacius, who ſays the *fidejuſſor judicio ſiſti* is bound for the parties' appearance at all times down to ſentence.

(47) The priſon may be where the admiralty chuſes—is uſually the Marſhalſea.

(48) See Huberus *De in Jus Vocando.*

bour, or any goods of his were found in theſe realms, it was ſeizable by his creditors; and by this means the Engliſh creditor had an eaſy remedy for his debt, and the foreign merchant acquired more credit in England, when it was ſo eaſy to find remedy againſt him; for this proceſs of attachment of goods went not only againſt thoſe in the actual poſſeſſion of himſelf, his factors, or agents, but alſo againſt thoſe in the hands of his debtors, ſince the maxim taken from Juſtinian's Code was, *debitor creditoris, eſt debitor creditori creditoris.* This ſalutary proceeding has in latter times gone into diſuſe in England, and great is the miſchief accruing to commerce from the want of it. It ſtill prevails in many parts of Europe, and gives to foreigners an evident advantage.

Appeals.

We come ultimately to conſider appeals. The mode and proceſs of appeal from this court is ſimilar to that from the eccleſiaſtical courts, *to which therefore we muſt generally refer.* It lies from a vice-admiralty court to the high court of admiralty, or from the latter to a court of delegates. Herein, however, they differ, that no appeal lies from the court of admiralty for a grievance, except it be a gravamen irreparabile, or an interlocutory having the force of a definitive ſen-

tence, which is agreeable to the rule of the civil law, though not of the canon (49).

The appeal muſt be interpoſed within *ten* days, the time allotted by the civil law; whereas in the eccleſiaſtical courts fifteen are given by ſtatute 24 Hen. VIII. ch. 12; and if from a grievance, ſhould be in writing, and ſpecifically contain the circumſtances of the grievance; whereas appeals from definitive ſentence may be either viva voce in the preſence of the judge, apud acta at the time of the ſentence, or reduced to writing within ten days after, before a notary public, who draws up an inſtrument of appeal, containing a ſhort account of the nature of the cauſe and the ſentence, ſigns it before witneſſes, puts his ſeal to it, and thus it becomes authentic.

Another remarkable diſtinction between appeals from grievances and thoſe from definitive ſentence is, that in the former the appellant is allowed to produce new evidence, under certain reſtrictions, *non allegata allegare, & non probata probare, modo non obſtet publicatio teſtium;* and the proofs are confined *novis articulis ex veteribus prudentibus, & ad cauſam pertinentibus;* whereas the appeal from a grievance muſt be ſupported by ſhewing

(49) Clarke in his 55th title explains by examples the meaning of a gravamen irreparabile. "Gravamen irreparabile "eſt quando non ſperatur alia ſententia de hac quæſtione, in "eodum judicio;" as if the defendant pleaded a releaſe, and the judge, without attention to his plea, admitted his adverſary's allegation.

the proceedings of the court, and from the very acts of the judge (50).

It is incumbent on the proctor, unleſs otherwiſe directed by his client, to appeal either apud acta, or before a notary in ſcriptis; for if he omits to appeal from a definitive, and any damage thence enſues, he is liable to an action by his client.

Appealing apud acta may be ſometimes neceſſary to prevent the inſtant intermeddling of the adverſary with the effects; and at others may not be adviſable, as if it be apprehended that the judge will aſſign too ſhort a time to retrocertify (51).

The party appellant muſt give freſh ſecurity, to proſecute the ſuit, to pay the coſts, to appear in judgment, and to ratify and confirm the deeds of his proctor, *de lite proſequenda, de expenſis ſolvendis, judicio ſiſti, et ratihabitione procuratoris*, for the ſureties below are not bound in the cauſe of appeal (52).

(50) It is a practice unknown in our law (though conſtantly followed in the ſpiritual courts), when a ſuperior court is reviewing the ſentence of an inferior, to examine the juſtice of a former decree, by evidence that never was produced below.

(51) See Oughton, title 294. For the advantage of appeals in ſcriptis from interlocutory having the force of definitive, ſee Oughton, tit. 295.

(52) This neceſſity of the impugnant's giving new ſureties on the appeal, ſays Clarke, may ſeem odd, ſince if

The party, after he has appealed, prays apoſtles from the judge *a quo*, i. e. ſhort letters diſmiſſory, ſigned by the judge, ſtating ſhortly the caſe and the ſentence, and in the room of further apoſtles, declaring he will tranſmit all the proceedings.

At the time when apoſtles are prayed, and granted, a time is appointed within which the party is to retrocertify to the judge *a quo* what ſteps he has taken, who otherwiſe will proceed to execute his ſentence. The apoſtles, when granted (53), are carried to the lord chancellor's ſecre-

the cauſe be *remitted* to the court below, the ſureties there are bound, as if there had been no appeal; but, ſays he, you muſt conſider 1ſt. That upon this laſt poſition there has been ſome controverſy. 2dly. Sometimes, though the promovent appeals and ſucceeds, the cauſe is not remitted, e. g. where he has recovered too large a ſum, and the court of appeal deducts the exceſs, and gives him his juſt debt. 3dly. If the impugnant is condemned on the appeal, upon new proofs, in a larger ſum than thoſe for which ſentence went againſt him below; in theſe two laſt caſes, the old ſureties would not all be reſponſible to him. Therefore, ſays Clarke, in all caſes the impugnant, when he appeals, muſt give new ſureties.

(53) If the appeal be in writing, which it always is, if from a grievance, there is no occaſion for apoſtles, as the inſtrument of appeal itſelf contains the whole matter of complaint; and where notice is given to the judge of ſuch an intended appeal in ſcriptis, he cannot put a rule upon the party to proſecute and retrocertify until after the time for appealing is out. The manner of obtaining a commiſſion of delegates, deſcribed by Oughton, is ſomewhat different from that above.

tary, and upon the back of them the chancellor names commiſſioners, or judges delegates; and the commiſſion being made out, two of them at leaſt muſt accept it, which they having done, iſſue an *inhibition* to the judge below to ſtop all further proceedings, and a *monition* to tranſmit all the paſt proceedings in the cauſe to them, which is done accordingly; and this *tranſmiſs* ſerves in the room of further apoſtles.

The inhibition contains alſo a warrant to arreſt the party, or is attended with a citation; and theſe inſtruments are to be ſerved on the judge, regiſter, and party, and certificate and affidavit of ſervice to be returned.

If the appeal be from a grievance, and it be proved to the ſatisfaction of the delegates, or admitted by the party appellate, the cauſe is retained above, and the delegates go on to hear the whole merits (54).

(54) If the reſpondent in the appeal thinks that the grievance is real, Oughton adviſes him to avoid further expence by confeſſing the grievance, and paying the coſts incurred on its account; and then, if he were impugnant below, to pray that the whole cauſe may be retained by the delegates, and that the appellant may proceed therein before them; but if he were the promovent below, he can *oblige* him to do ſo, becauſe the impugnant who appeals, cannot deny that he conſents to the judges above, and makes them judges of his cauſe.—Oughton, tit. 286.

As the appealing from a grievance is very often a trick for delay, it ſeems reaſonable that either party ſhould have a

The cauſe muſt be proſecuted within a certain term, i. e. the appeal proceeded on; and this term is two fold, *terminus juris*, and *terminus hominis*; the latter ſignifying the limit of time within which the judge has bound the party to proceed, on pain of his otherwiſe executing his ſentence; the other the boundary aſſigned by the law in caſe none be aſſigned by the judge, which is one year, called *primum fatale*, becauſe under ſome ſpecial circumſtances a ſecond year may run, called *ſecundum fatale*, 2 Rob. p. 225 (55).

power, by confeſſing the grievance, to retain the cauſe above. In the title juſt mentioned, Oughton would ſeem to make a diſtinction between promovent and impugnant, giving greater privilege to the latter; yet in the next title, 287, he gives equal power to a promovent when made reſpondent in matrimonial cauſes, or ſuits for legacies, and lays down a principle, ſurely extending to both parties, viz. *Appellans, appellando, recuſavit judicem a quo, tanquam ſibi ſuſpectum, & minus indifferentem, et conſentit pro parte in judicem appellationis.*

(55) If the party ſerves an inhibition on the judge *a quo*, within the time limited for retrocertifying, that judge's power ceaſes, and attempts or *attentates* of his afterwards, or during the period given to retrocertify, will be revoked and declared invalid by the judge of appeal. If the appellant, after inhibition ſerved, neglects to proſecute his ſuit, the appellate may put a rule upon him above; proteſting, however, againſt the juriſdiction of that court to proceed, otherwiſe to be diſmiſſed with coſts, and the cauſe remitted to the court below.

If the party doth not chuſe, or omits to do this, and the appellant doth not proceed during one year, the appellan-

The appeal proceeding, an appellatory libel is exhibited: this is conteſted or anſwered by the oppoſite party; the depoſitions are read from the tranſmiſs, in which all the proceedings below are made up in the form of a book; advocates are heard, and the delegates proceed to pronounce ſentence, and according to their judgment decree *bene* or *male appellatum*; and in the latter caſe approving of the ſentence of the judge below, ſend back the whole cauſe to him, with all its incidents, to be by him carried into execution; or they may, if they pleaſe, though he remits the cauſe, retain the taxation and enforcement of the coſts; and it muſt be remembered, that all proceedings before the delegates are ſummary.

Prohibition.—If a court errs within the pale of its juriſdiction, it is cauſe of appeal: if it exceeds its juriſdiction, it is ſubject for a prohibition (56), which iſſues out of any of the courts of law, moſt

may call upon him to ſhew cauſe, why the appeal ſhould not be declared to be deſerted; and though he appears, and attempts to ſhew cauſe, and offers to proceed, may, if he can prove the deſertion, ſtop him, and then the judge declares the appeal deſerted, and remits the cauſe; but for ſome ſpecial reaſons, where, in the latter part of the year, the party has been diligent, and gives ſome plauſible reaſons for his delay in the former, a part or the whole of a ſecond year is given to him.

(56) Whatever is here ſaid of prohibitions to the admiralty, may be applied with very inconſiderable variations to the ſpiritual courts.

uſually out of the king's bench, and in time of vacation when the law courts are not open (for a judge cannot grant a prohibition in his chamber), may iſſue out of chancery, returnable into the king's bench or common pleas (57).

The party muſt take care not to ſubmit to the juriſdiction of the court, which he doth not merely by appearing, becauſe he cannot tell what the complaint then is till a libel be exhibited (58); but if he anſwers the libel, without pleading to the juriſdiction of the court and declining it, he cannot afterwards obtain a prohibition, unleſs the want of juriſdiction appears on the face of the libel itſelf (59), but if the want of juriſdiction appear on the face of the libel, he may apply for a prohibition even after ſentence.

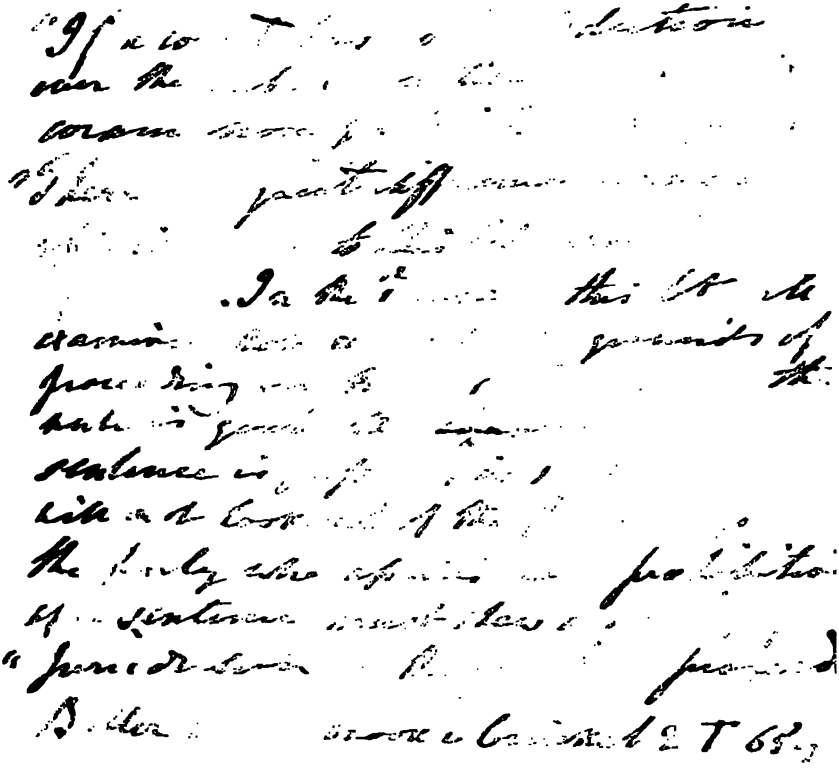
And if the want of juriſdiction do not appear upon the face of the libel, the impugnant ſhould put in a declinatory exception or plea to the juriſdiction, which if it be over-ruled, he files his ſuggeſtion in the court of law, ſtating the circumſtances of his caſe, and ſhewing them to be out of the juriſdiction of the admiralty, and ſupporting that ſuggeſtion by an affidavit, applies for a prohibition, and may be oppoſed by counter

(57) 1 P. W. 43 and 476.

(58) In fact, he cannot move for a prohibition before appearance, and a libel exhibited. 1 Salk. 35.

(59) In a court of law, after an imparlance, it is too late to move for a prohibition.

affidavits: but if the point be too nice and doubtful to be determined on mere motion, the court will direct the party to *declare* in prohibition, that is, to prosecute an action, by filing a declaration on a supposition (which is not traversable), that his opponent has proceeded in the court below, notwithstanding a writ of prohibition.



CHAPTER X.

ON THE PRACTICE OF THE PRIZE COURT.

IT is the duty of the commanders of all ſhips (and this duty is particularly enjoined in the inſtructions given to the commanders of ſhips commiſſioned) when a prize is by them taken in war, to bring the ſhips, veſſels, and goods ſo taken, into ſuch port, in ſome part of his majeſty's dominions as ſhall be moſt convenient, in order to have the ſame legally adjudged in the high court of admiralty of England, or before the judge of ſome other admiralty court, *lawfully authorized*, within his majeſty's dominions, according to the place into which the prize may be brought, and if they omit to proceed to adjudication of ſuch their prizes, or unreaſonably delay, any perſons claiming property in the ſhips or goods by their proctor, or the king's proctor, or proctor of the admiralty for the king's intereſt, as the caſe may be, may obtain monitions to be decreed againſt the captors, citing them to proceed to adjudication, which if they will not do, the ſhip will be adjudged to the perſons or parties proving an intereſt.

The prize being brought into port, the next duty of the captors, or their commander, is, as ſoon as poſſibly may be, to bring and deliver into the judge of that court of admiralty, to whoſe juriſdiction the matter appertains, or his ſurrogate, all papers, paſſes, ſea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings which ſhall have been found on board the prize, which are to be numbered; and their number ſpecified in an affidavit to be made by the taker, or one of his chief officers, or ſome perſon preſent at the time of the capture, and of the papers being found and delivered up (1); in which affidavit it muſt be ſworn that the ſaid papers, &c. are brought in as they were taken, without fraud; or if any are wanting, they muſt be accounted for, and at the ſame time the captor ſhould ſend before the judge, or his lawful commiſſioners, ſome principal perſons of the ſhip's company, to be examined upon the ſtanding interrogatories.

Theſe ſtanding interrogatories (a copy of which is to be met with in every admiralty office) are interrogatories which have been drawn up in general terms with great care and accuracy, for the purpoſe of diſcovering the truth concerning the intereſt and property in ſhips and their cargoes.

(1) This duty is enforced not only in private inſtructions, but by the act of the 22d Geo. II. on pain of the commander of the capturing ſhip forfeiting his ſhare of the prize.

In the mean time the ſhip and cargo are to be carefully kept and preſerved, and no ſale thereof, and no waſte or ſpoliation to be admitted, nor bulk to be broken, before judgment; and in the plantations abroad they are to be under the care of the collector and comptroller of the cuſtoms, or where there is no comptroller, of the naval officer.

The ſhip's papers being introduced, with the uſual affidavit, the judge, at the petition of the captor's proctor, decrees the uſual monition againſt all perſons in general having, or pretending to have, an intereſt, &c. &c. The examinations of the witneſſes to the ſtanding interrogatories, or in prepatorio are taken by the judge, or ſuch perſon or perſons as are by him appointed for that purpoſe. *

This examination muſt be finiſhed within five days, and the monition iſſued and executed in the *uſual* manner, within three days after requeſt made in that behalf to the judge or other perſon thereto authorized.

If within the ſpace of twenty days after the execution of the monition (2), no perſon appears to diſpute the legality of the prize, or if within that time a claimant appears, but doth not within five days from the time of entering ſaid claim give ſecurity to pay ~~double~~ coſts in caſe the veſſel be

(2) So I underſtand the act. It is oddly worded; the words are, if no claim be entered, giving twenty days notice of the monition.

adjudged lawful prize; the ship or vessel must immediately, or with all convenient speed, be condemned, or acquitted and discharged, upon the evidence of the ship's papers, if such there are, or of those found on board any other ship regarding the capture, and of the examinations *in preparatorio*.

If within twenty days a claimant appears, and gives in his claim in regular form, and within five days from the time (3) of entering the claim, gives sufficient security to pay double costs in case his claim be defeated, and upon the examination in preparatorio, and ships papers being produced, there appears no occasion to go into any further examination; the judge is, within ten days, if possible, to proceed to sentence.

But if the court be not satisfied from the ship's papers, and the examination ~~on the standing interrogatories,~~ and still have doubts whether the capture be lawful prize or not, and it shall appear necessary to the judge to have an examination of witnesses on *pleadings* given in by the parties, and admitted by the judge, and such examination be desired and the capture still disputed, he orders such examination accordingly, under the well-known phrase of further proof, ~~the parties put in their pleadings~~, and the cause proceeds upon ~~plea and proof~~, though

(3) This was omitted in the old prize acts, so that it did not appear from whence the five days were computed.

sometimes the judge may order further proof of a less solemn nature, without pleadings being filed or put in. The proceeding by plea and proof is of the most solemn kind. Where the parties are put to plead, the claimant's proctor may pray that his adversary shall alledge, and is also to alledge himself, both parties being plaintiffs or claimants, and the proceedings go on to sentence, as in other summary causes, according to the course of the civil law, as may be seen by the rules in a cause given in the note beneath (4); and having been already

(4) PILLANS *v.* THE VICTORIA.

King's proctor first introduced the ship's papers, with an affidavit annexed, and the judge decreed the usual monition against all persons in general, &c. &c.

Next day. King's proctor produced witnesses on the standing interrogatories.

Next day. Upon affidavit a commission issued to the marshal to unload and store the cargo of said ship.

Next day. More witnesses produced to the standing interrogatories.

Next day. D. F. Proctor exhibited two claims for J. Martin, with affidavit annexed, and gave security to pay double costs in case the ship and goods should be condemned as lawful prize.

Next day. Three more claims for three other persons exhibited in like manner by D. F.

Next day. A commission of valuation and appraisement of the ship and goods claimed by Martin, decreed at his proctor's petition.

Next day. King's proctor returned the monition abovementioned, and the certificate of the execution of it was

delineated in the laſt chapter, it is unneceſſary to repeat them here.

On the evidence however to be given in theſe prize cauſes, and the mode thereof, and the caſes in which further proof is uſually granted or denied, ſome obſervations are neceſſary; but we muſt firſt pauſe a moment to conſider the proviſion which is made by the prize acts (when it is thought neceſſary to order ſuch further proof ~~or examination of witneſſes upon pleadings~~) to prevent the ſhip and cargo from periſhing by ſuch delay, ~~decompoſition for unloading iſſues, and the judge cauſes the capture to be appraiſed by ſkilful perſons, named by the parties, and appointed~~

continued as to all perſons not appearing, till next court-day; and king's proctor, at claimant's proctor's petition, was aſſigned to allege.

Allegations on both ſides conteſted negatively. Witneſſes examined to interrogatories. Depoſitions publiſhed. Exceptions to the promovent's witneſſes' depoſitions. A term probatory on the exceptions. A corroborative matter, which was by the impugnant conteſted negatively, and promovent reſtrained to the term of law for proof thereof. 1ſt. Term probatory lapſes to the corroborative matter. 2d. Term probatory lapſes. Publication decreed. This was the 11th Dec. 13th Dec. a day for hearing is appointed. 18th. Cauſe begins to be heard. 25th. Sentence of condemnation paſſed. But in common and ordinary caſes there are no allegations; the captor preſents a petition, the examinations in preparatory are taken—the uſual monition iſſues—a claim is put in with atteſtations; and on the ſhip's papers, and the other evidence, ſentence is given.

by the court, and an inventory of them being first taken, if the judge thinks neceſſary, by the marſhal or his deputy, and they put into warehouſes with ſeparate locks, of collector and comptroller; or if no ſuch perſons, of the navy officer, or agents of the parties, at the charge of the party deſiring the ſame, then, within fourteen days after making the claim, the judge ſhall proceed to take ſecurity from the claimants to pay the captors the full appraiſed value of ſaid goods, in caſe they be adjudged prize; and from the captors to pay coſts, in caſe of a converſe deciſion, and ſhall then make an interlocutory order for delivering the ſame to the claimants, or their agents; and if the claimants will not give ſuch ſecurity for the value of the goods, the judge may take it from the captors, conditioned to pay the claimants, if the goods be not condemned, and then, on an interlocutory order, cauſe them to be delivered to the captors. And if ſuch ſecurity be refuſed, and the cargo be periſhable, a commiſſion of appraiſement and ſale may iſſue, and by 41 Geo. III. ch. 96, in the inſtances ſhewn therein, it may be ſent by vice-admiralty courts abroad, to England for ſale (5).

I proceed now, according to the promiſe above, to make ſome obſervations on the general nature

(5) By 41 Geo. III. ch. 96. in ſuch caſe the proceeds are not to remain in the hands of the captors, but to be brought into the regiſtry, if it be a vice-admiralty court.

of the evidence in prize cauſes, on the mode of giving it, and the grounds for granting liberty of further proof.

The evidence to acquit or condemn, with or without coſts or damages, muſt, as we have ſeen, come in the firſt inſtance from the ſhip's papers, and the examination of the maſter and other principal officers, upon general and impartial interrogatories, for which purpoſe there are officers of admiralty in all the conſiderable ſea-ports of maritime powers.

A claim put in in oppoſition to the captors, muſt be ſupported upon oath, at leaſt as to belief; it is made in a certain uſual form (6); ſubſtitution of intereſts is ſometimes allowed therein, and it may be barred by illegality of traffic (7).

Some of the grand circumſtances, which, if proved, go ſtrongly to condemn the ſhip, or at leaſt to excite ſtrong ſuſpicion, are the want of complete and proper papers, the carrying falſe or colourable papers, the throwing papers overboard, prevarication in the maſter and officers examined in preparatorio, ſpoliation of papers, the maſter not knowing who the owners are, or not being able to give an account whoſe property are the ſhip and cargo, the national character and domicile of the maſter; his conduct, and

(6) See the form in an Appendix to 2d Robinſon; and a faulty deviation from it, ſame book, p. 170.

(7) See 2d Robinſon, p. 83 and 85.

that of the veſſel herſelf; the time when the papers were compoſed, with many others creating greater or leſs degrees of ſuſpicion according to their nature.

The duty of the commiſſioners, or examiners, in taking the evidence is regulated by the prize act, and certain paſſages in the inſtructions given to cruiſers. They are appointed by the court, though the court may accept the recommendation of parties for its own convenience. They repreſent the court, performing certain functions of the court, and they may be revoked or continued at the diſcretion of the court.

The commiſſioners are bound to receive every ſhip's paper, and not to take upon themſelves to judge whether they are of importance or not. They are to take care not to examine witneſſes produced at an irregular time; and when the depoſitions have been taken or tranſmitted, are not to go on examining afterwards, as has ſometimes happened.

We come next to conſider the allowance of *further proof*, where the court is not ſatisfied with that originally produced, and to ſtate the manner in which it is made, the circumſtances which affect it, or by which this privilege of the claimants is forfeited, and the effects it produces.

Proof in ordinary caſes may conſiſt on the part of the claimant of atteſtations, letters of orders and advice, invoices and bills of lading, and the

like. If further proof be ordered for want of theſe, or becauſe they are not ſufficient, it may be either required in general terms, or required to be of the moſt ſolemn nature by plea and proof. In the laſt mode, all the proof that the caſe can ſupply is demanded, each party has an opportunity of ſtating his caſe in a diſtinct allegation, and is called on to ſupport it by the beſt proof the nature of his caſe can afford.

Further proof then is only ordered from the claimant, and is only admiſſible under the *ſpecial direction* of the court.

This privilege of further proof allowed, is forfeited by the claimant if he appear to be guilty of fraud (8), or *mala fides*, or violation of the laws of neutrality. It is juſtly ſaid to be the privilege of honeſt ignorance, or honeſt negligence.

When further proof has been ordered, and the cauſe has undergone a trial of this nature by plea and proof it is final; and no ſecond reference is ever made for further proof (9).

(8) Such as falſe claims, falſe papers, or ſpoliation.

(9) 1 Robinſon, p. 37.

If either party be diſſatisfied with the definitive ſentence, or interlocutory decree, having the force of a definitive, paſſed by any court of admiralty or vice-admiralty enabled to try prize, he may appeal within fourteen days after it is pronounced, to the lords commiſſioners for hearing appeals in cauſes of prize, giving good ſecurity to proſecute the appeal, and anſwer the condemnation and coſts if the ſentence ſhall be confirmed; but its execution is not to be ſuſpended, if the party appellate give good ſecurity to reſtore the ſhip or goods, or the full value thereof, if the ſentence be reverſed. The appeal muſt be proſecuted within ~~a reaſonable time~~, (and this was *before* the ſtatute of 38 Geo. III. ch. 38. by taking out the uſual inhibition within three months after ſentence in the high court of admiralty, and within nine after ſentence in any of the vice-admiralty courts; but the time is extended by that act in all courts to twelve months (10), within which, if the inhibition be not taken out, the ſentence ſtands confirmed without power of reverſal, unleſs the time be enlarged by ~~his majeſty's ſpecial order in council~~.

When ſuch his majeſty's ſpecial order is given,

(10) By that act, where decrees had been already given, and no appeal interpoſed within nine months, the captors not compellable to make compenſation.

if diſtribution be made after the time of appealing would be out, if no ſuch order had been made, the captors are not compellable to make compenſation (11).

A perſon not a party in the firſt cauſe intervene by appeal, he muſt by ſtatute law at the ſame time give in his claim, otherwiſe his appeal is null, and pray the uſual inhibition within one year, after which he is not entitled to an appeal (12).

When an appeal is interpoſed, the court of admiralty, at the requeſt of either captors or claimants, is by ſtatute (13) bound to order the capture to be appraiſed, and on ſecurity being given for the value, to deliver it to the party giving ſuch ſecurity; and if there be any difficulty or objection as to the ſecurity, may order the goods and effects to be entered, landed, ſold,

(11) By the ſame ſtatute, 38 Geo. 3. ch. 38. In ſuch caſe captors on requeſt of claimants deliver accounts of ſales to his majeſty's procurator general, otherwiſe they loſe the benefit of the act. The procurator general to defend in ſuch appeals, in ſuch manner as his majeſty's advocate-general ſhall direct.

(12) See 33 and 38 of the king, above-mentioned.

(13) See prize act, 1793, and the ſtatute 38 Geo. III. ch. 38. Some modifications calculated for the meridian of the Weſt Indies, as made by the act 41 Geo. III. ch. 96, will be given in the chapter of Vice-Admiralty Courts.

and the money brought into court, and then depoſited in the bank of England, or, by conſent, in public ſecurities, in the name of the regiſter, and of truſtees choſen by the parties and approved by the court; and if the ſecurity is given by claimant, the judge is to give the veſſel a paſs to prevent its being taken.

CHAPTER XI.

OF THE ADMIRALTY AS A CRIMINAL COURT.

THE criminal juriſdiction of the admiralty was formerly very important. Its criminal court was held before the lord high admiral, or his deputy, ſtiled judge of the admiralty. It had, according to Sir W. Blackſtone, cognizance of all crimes and offences, the ſeſſions of admiralty now hath, committed either upon the ſea, or on the coaſts out of the body or extent of any Engliſh county, and of death or mayhem happening in any great ſhip, being in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a ſort of ports or havens (1); ſuch ſays the commentator, as are the ports of London and Glouceſter.

This court having proceeded conformably to the civil law, without jury, ſo that a man might

(1) Yet we find conſtant inſtances to the contrary; the trial for the murder of Sir John Goodere, at Kingroad, Briſtol, by his brother, a captain of a man of war, reported in the State Trials; and Bradfoot's trial for murder at the ſame place, reported in Foſter's Crown Law, were both before ordinary commiſſions of gaol delivery, and not at an admiralty ſeſſions.

be deprived of his life by the opinion or caprice of a ſingle judge, and having alſo, according to the ſame law, required confeſſion, or *two* witneſſes, ſo that the guilty might often eſcape (2); the Engliſh nation became uneaſy under its authority, and having in vain attempted to invade it in the reign of Henry VI. at laſt ſucceeded in obtaining the act of parliament, 28 Henry VIII. ch. 15. which enacted, that offences upon the ſeas ſhould be tried by commiſſioners of oyer and terminer, under the king's great ſeal; namely, the admiral or his deputy, and three or four more, (among whom two common law judges are uſually appointed) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by a petty jury; and that the courſe of proceedings ſhould be according to the law of the land. This is now, ſays Blackſtone, the *only* method of trying marine felonies in the court of admiralty: the judge of the admiralty ſtill preſiding therein, as the lord mayor is the preſident of the ſeſſion of oyer and terminer in London. And yet how far the old common law criminal court of admiralty be extinguiſhed, or remain concurrent, at leaſt as to miſdemeanours, may well be a queſtion as to this ancient court and its practice (3).

(2) This rule of the civil law ſeems to have been intended in mercy, but it often was the cauſe of cruelty, by introducing the rack to extort confeſſion.

(3) See Appendix, No. 3.

And by this act, and 27 Henry VIII. ch. 4. theſe offences may be enquired of, heard and determined in ſuch ſhires and places in this realm, as ſhall be limited by the king's commiſſion, as if ſuch offences had been committed upon land.

In Ireland a ſimilar ſtatute was paſſed in the eleventh year of James I. ch. 2.

By the ſame ſtatute, 28 Henry VIII. the jury is to be of the inhabitants of the ſhire, and no challenge to be for the hundred; and ſuch as ſhall be convict of any of the offences mentioned in the ſtatute, viz. of treaſons, felonies, robberies, murders, and confederacies upon the ſea, or in any haven, river, creek, or place, where the admiral hath, or pretends to have, juriſdiction, ſhall ſuffer ſuch pains of death, and loſſes of lands and goods, as if they had been convicted of the ſame offences done upon land.

Subſequent ſtatutes giving authority to the admiralty, will be mentioned under the head of piracy. Before the above-mentioned ſtatutes were paſſed, it appears by the well-known articles, Magiſtri Roughton, that it was cuſtomary for the admiral to make circuits, to ſummon juries of twenty-four men to enquire into a vaſt variety of naval offences, and to puniſh even with death.

By a very late act, regular times are appointed for the ſitting of the court of admiralty at the Old Bailey, viz. twice in the year. See the Prize Act of 1793, 33 Geo. III. ch. 66.

Our buſineſs then is to enquire what is the law which governs the court of admiralty ſeſſions, what the extent of its juriſdiction, and what its practice.

To the firſt the anſwer is eaſy. Whatever is treaſon, whatever is felony, whatever is a miſdemeanor, whatever is a nuiſance or an offence, whatever is miſpriſion or an abuſe committed upon the land, the ſame thing being committed upon the ſea, or within the limits of this commiſſion, muſt be reputed and adjudged treaſon, felony, miſpriſion, offence, miſdemeanor, nuiſance, and abuſe, &c. (4); it is the ſame thing, it carries with it the ſame guilt, and it is liable to the ſame kind of puniſhment, with one remarkable exception, that wherever a priſoner would at law be found guilty of manſlaughter, he was in the admiralty acquitted (5). But this has been altered by a late act, 39 of Geo. III. ch. 37, which puts this crime on the ſame footing as if committed on ſhore; and conceiving differently from Sir Lionel, that the law previouſly extended only to treaſons, felonies, and confederacies, enacts, that all offences on the ſeas ſhall be liable to the ſame puniſhments as the like crimes on ſhore.

One marine crime, however, demands our peculiar attention, on account both of its enormity,

(4) Sir Lionel Jenkins, 1 vol. xcvii. and ſee the 27th article of Magiſtri Roughton.

(5) This appears to be derived from the civil law. See ante, the chapter on Public Wrongs.

and of its being almoſt confined to the ſeas: I mean that of piracy.

Piracy is depredation without any authority from any prince or ſtate, or tranſgreſſion of authority given, by deſpoiling beyond its warrant. A nation never can be deemed pirates. Fixed domain, public revenue, and a certain form of government, exempt from the character (6). The States of Barbary, therefore, are not treated by Europe as pirates.

Mr. Woodeſon ſeems to think that a commiſſion from a foreign prince ſcreens from the imputation of piracy, as in Cheline's caſe (7); ſurely not, if the commiſſion be wantonly exceeded: but at all events, our ſtatute law puniſhes with death, and conſiders as piracies, depredations committed by his *majeſty's ſubjects*, under colour of foreign commiſſions (8).

The moſt intereſting queſtions which offer themſelves on this head are, whether piratical taking can alter the property—whether all non-commiſſioned captors are pirates—and to whom the goods of pirates belong.

It is an univerſal principle of the law of nations, that the ſpoil never veſts in piratical captors, and cannot be by them transferred to third perſons, but muſt be reſtored to the original owners on ſal-

(6) Cicero Philipp. 4.

(7) 2 Sir L. Jenkins, 754.

(8) 11 and 12 Will. III. ch. 7. and 18 Geo. II. ch. 30.

vage; but it is ſaid there is an exception if ſold in market overt, at leaſt unleſs the pirate be legally convicted. Now this plainly cannot be, for no ſale can be valid without a legal condemnation (9), according to the Engliſh rules, and that in a piratical caſe never can be had.

Unlawful depredation is of the eſſence of piracy. How, therefore, any queſtion could ever have been made, as to captures by perſons from land ſeizing enemies ſhips in our ports, or by merchant ſhips at ſea defending themſelves when attacked, which captures become droits of admiralty when ſtatutes do not interfere, doth not ſeem clear.

The goods of pirates, not taken from others, by the common law belong, after attainder, to the crown or its grantee (10); and ſo do the ſpoils of others found on board, unleſs claimed within reaſonable time. But by ſtatute (11), merchant ſhips ſucceſsfully fighting againſt pirates are allowed to ſhare in the prize like privateers.

The ſtatutes more particularly relative to piracy are the following: Firſt, 11 and 12 Will. III. ch. 7. now perpetual, which empowers commiſſioners under the great ſeal, or the ſeal of the admiralty, in any part of his majeſty's dominions, to try piracies, felonies, and robberies, committed in places within the admiral's juriſdiction; the trial to be had on ſhipboard or upon land, as occaſion may require.

(9) Burrow. 694—5. (10) 3 Bul. 148.
(11) 22 and 23. Ch. II. ch. 11.

The ſame act puniſhes with death piracies committed by any of his majeſty's ſubjects, upon others his majeſty's ſubjects, under colour of commiſſions from any foreign ſtate (12). Alſo all acceſſaries in piracy, by confederating with pirates, receiving goods from them, preventing reſiſtance to them, or in any other mode therein enumerated; and it gives large rewards for vigorous defences againſt pirates (13).

By 4 Geo. ch. 11. all perſons who ſhall commit any offences for which they may be adjudged pirates by the ſtatute of William, may be tried as by the act 28 Henry VIII., and are debarred the benefit of clergy.

By 8 Geo. I. ch. 24. ſince made perpetual, all perſons made acceſſaries by the ſtatute of William are declared principals, and the caſes conſtituting piracy extended.

I know not where ſo well to take the extent of the criminal juriſdiction of the admiralty as from the celebrated charges of Sir Lionel Jenkins, who in fact almoſt repeats the articles of Roughton.

He begins by ſtating the ſcope and end of the commiſſion, which is to enquire of, hear, determine, and puniſh all crimes, miſdemeanors, of-

(12) See 18 Geo. II. ch. 30. To the ſame purport perſons tried under it, are not to be tried again in Great Britain. Not tried under it, may; as for high treaſon.

(13) By the 8th Geo. I. ſeamen maimed in fight with pirates, beſides the other rewards, ſhall be provided for in Greenwich hoſpital.

fences, and abuſes, either againſt the dignity of the king, againſt the peace and good government of the kingdom, or againſt the rights and ſecurity of the ſubject, when and as often as ſuch crimes and offences happen to be committed upon the ſea, or in ſome haven, river, creek, or place, where the admiral hath power and juriſdiction.

He then obſerves, that beſides the four ſeas (14) which are the *peculiar* care of the crown of England, the king has a concern and authority, in concurrence with all other ſovereign princes who have ſhips and ſubjects on the ſea, to preſerve the public peace, and to maintain the ſecurity of navigation all the world over. So that not the utmoſt bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part in any ſea can prevent, but that if the peace be violated upon any of his ſubjects, and the offender be afterwards brought up, or laid hold on, in any of his majeſty's ports, ſuch breach of the peace is to be enquired of, and tried in virtue of a commiſſion of oyer and terminer, in ſuch county or place as his majeſty ſhall pleaſe to direct; and whatever obligation his majeſty has to have the peace duly preſerved upon

(14) The quatuor maria, as they are called by foreigners, and in modern treaties the Britiſh ſeas, are thoſe which ſurround Great Britain:—1. the Channel ſouth, between England and France; 2. the Iriſh or St. George's Channel, and the Dencaledonian Sea, waſhing the weſt of Scotland; 3. the Caledonian, on the north of Scotland; 4. the German Ocean, waſhing the eaſt of Britain.

land, the ſame he hath at ſea, ſince trade cannot flouriſh without ſecurity, and ſhipping and navigation muſt decay with decaying commerce.

He then inſiſts, as he had done in other places with reſpect to the civil juriſdiction of the admiralty, that the enquiries and preſentments in this court are to be of things done upon the ſea, or in any haven, river, creek, or place, where the admiral hath or pretends to have power, authority, or juriſdiction. The word pretend, he obſerves, has been thus commented upon by Lord Coke, and the uncertainty it ſeems to import cleared up, that between the high water and low water-marks, the admiral hath juriſdiction *ſuper aquam* when the ſea does flow, and as long as it flows, but the land is *infra corpus comitatus* at the reflow; ſo that of one place there is *diviſum imperium* at ſeveral times. But not content with this expoſition, Judge Jenkins inſiſts on the words of the commiſſion, which directs enquiry of things done not only upon the ſea, and in havens, creeks, and rivers, as in the ſtatute, but alſo in all places whatſoever within the flowing of the water, to the full ſea-mark; and in all great rivers from thoſe bridges downwards that are next the ſea (15).

(15) Here Sir Lionel is certainly too poſitive. The river at Limehouſe, Deptford, and Graveſend, has been determined to be infra corpus comitatus, and the admiralty

He then proceeds to conſider the particulars which come under the cognizance of this criminal court, which he reduces to three heads.

Under the firſt he places treaſons, felonies, robberies, murthers, and confederacies, upon the high ſeas, &c. which are the words of the ſtatute of Henry the Eighth, which ſtatute is the ground of the commiſſion.

Under the ſecond, thoſe offences and miſdemeanours which were made ſo by ſeveral other ſtatutes recited in the commiſſion, for the due obſervation of which the court were made juſtices of peace and gaol delivery, in thoſe caſes where the tranſgreſſion is on the water: under that head he reduces thoſe things which are offences and miſdemeanours at common law; being enquirable and preſentable when they are committed upon the ſea, or within the limits of the commiſſion.

Under the third head, he reduces thoſe miſdemeanours and abuſes that are contrary to the ancient laws and uſages of the ſea, and contrary to the particular conſtitutions and ordinances of the admiralty of England; for the commiſſion directed thoſe things to be enquired of there alſo, though they be puniſhed ſolely before the admiral, or his lieutenant, in the court of admiralty.

there not to have juriſdiction, ſave as to death or mayhem; and quere as to them, for Kingroad, Briſtol, is much more the ſea, and murther there has been tried in the recorder's court.

He begins with thoſe of the firſt rank, the blackeſt and moſt heinous enumerated by ſtatute of Henry the Eighth—treaſons, felonies, robberies, murthers, manſlaughters, and confederacies. He makes no obſervation that is new until he comes to confederacies; but from thence his charge is ſo particular and curious, that I have thought it beſt to repeat it verbatim, eſpecially as his work, though ſo valuable, is now become very ſcarce, and of no ſmall price.

"You are, ſays he to the jury, to enquire if any ſhip-carpenters, or other workmen, being employed to work in any haven, port, or creek, or in any place within the flowing or reflowing of the water, for the building, repairing, or fitting out of ſhips, have confederated not to work under ſuch and ſuch a rate; or not to work but at ſuch hours of the day, or elſe not to finiſh a work that another hath begun. This was anciently felony in ſome trades, and it is ſtill ſeverely puniſhable (16).

(16) By ſtatute 33 Geo. III. ch. 67. if ſeamen, keelmen, ſhip-carpenters, or other perſons, riotouſly endeavour to hinder or deter other ſeamen, ſhip-carpenters, &c. from working at their buſineſs, they are to be impriſoned and kept at hard labour for a time not exceeding twelve months. Second offence felony, with tranſportation. Maliciouſly burning a ſhip, felony without clergy. For deſtroying or damaging without fire, tranſportation. All theſe offences, if committed on the high ſeas, are triable at the admiralty ſeſſions, as alſo the riotouſly oppoſing the loading, unloading, or ſailing of ſhips.

"You are to enquire of ſuch maſters of ſhips and others, as have colourably, and by fraud and confederacy with foreigners, gotten foreign bottoms, or ſhips to be made free, while foreigners have any intereſt in them. You are to preſent thoſe ſhips and the confederates. Or if any have confederated, and taken in on board them any goods or merchandizes to be exported, or elſe to be imported, in *fraudem legis*, and contrary to the true intent of the ſeveral acts made, ſince his majeſty's moſt happy reſtoration, for the encouragement of navigation.—Or if any being upon the water, have confederated and received goods or merchandizes on board them, or elſe delivered out goods or merchandizes from on board them, without paying his majeſty's cuſtoms: this we are likewiſe enjoined, by an ancient conſtitution of the admiralty, to enquire after with all diligence. If any ſeamen, officers, or common mariners, have either upon the ſea, or in any port (eſpecially in any foreign port), by mutinous words or practices, invited each other or conſpired together, to oppoſe or diſobey their commanders (17), or to obſtruct or hinder any

(17) This may be ſo ſtill as to merchant ſhips, but on board his majeſty's ſhips of war ſuch offences are now tried by courts martial. See 19th and 20th of the articles of war in the ſtatute 22 Geo. II. by which mutiny, on conviction by a court martial, is puniſhed with death. Concealment of mutiny and ſeditious words, with death, or ſuch other puniſhment as the court direct. But ſee 37 Geo. III. ch. 70.

ſervice they were upon, eſpecially to hinder or break any voyage in hand; I ſay, ſuch confederacies are intolerable, it is the diſhonour of our nation, the ruin of our merchants, and the deſtruction of our trade; therefore to be enquired after moſt diligently, and to be puniſhed moſt ſeverely.

"There is another ſort of confederacy much more dangerous than all this, becauſe it involves in it a public affront to the crown and dignity, to the right and ſoveignty of the king, and alſo a public diſgrace and reproach to this nation. It is when foreigners' privateers, or others, do confederate and refuſe to give and allow to his majeſty his ancient right of the flag upon his four ſeas (18), his un-

(18) Sir Lionel Jenkins has given us a memorable example, in which he was perſonally concerned, of this right of the flag, carried to an extraordinary length early in Charles the Second's reign. The Cleaveland Engliſh yacht, on board which he was himſelf, being at anchor cloſe to the town of Brill, in Holland, a government yacht belonging to the States of Holland, having on board embaſſadors going to England, paſſed without ſtriking her flag, and ſoon after, being cloſe on board a Dutch man of war, the States' flag was changed, and hoiſted at the man of war's top-maſt-head. The captain of the Engliſh yacht aſked Sir Lionel what he ſhould do, who told him that even old Van Tromp had ſtruck to Lord Arundel in Goree road; upon which the Engliſh yacht fired three ſhot at the man of war, one under her forefoot, another over the poop, and a third between the maſts. The Dutch embaſſadors on this ſent a meſſage, ex-

doubted right of ſanctuary in his ports and other places of ſafety, commonly called the king's chambers; or when they conſpire to diſallow his right of ſafe conduct to ſuch ſhips as his majeſty ſhall grant his royal letters of ſafe conduct to paſs theſe ſeas, in a time of war as this is. All theſe are direct confederacies againſt the king, to uſurp his rights, and by degrees to encroach upon a poſſeſſion the moſt conſtant, uninterrupted, and ancient in the whole world.

"You are therefore to enquire if any foreign ſhip, man of war, or other, being met with in any part of the four Britiſh ſeas, hath refuſed to ſtrike her flag, and lower her top-ſail to any of his majeſty's ſhips or veſſels carrying his majeſty's flag, enſign, or jack. Or if any captain or commander of any ſhip or veſſel, carrying the king's flag, jack, or enſign, hath not demanded that reſpect due to the king's colours; when it was delayed, or refuſed, or not paid at the due time, and after the accuſtomed manner, and hath not purſued ſuch refuſers as pirates. Or if any foreign men of war have pre-

preſſing much ſurprize, and ſaying that they were not to ſtrike their flag, being in their own ports. But the buſineſs terminated in the Dutch man of war ſtriking the flag, though it was that of the States.

Bynkerſhoek admits the ſuperiority of the Britiſh fleets, and that the Dutch were by treaties bound to ſtrike their flag in all the ſea, *inter Septentriones, & promontorium cui nomen finis terræ*, but thinks this particular act was intended to provoke a war.

ſumed to wear any of his majeſty's colours, or the colours of any prince or nation, ſaving their own, in theſe ſeas, which is ever the true badge of a pirate, and thoſe that do it, are to be purſued as ſuch.

"The next thing is the right of ſanctuary and ſafe conduct, which the king hath time out of mind exerciſed, not only in his harbours and ports, but eſpecially in his chambers (19).

"You are therefore to enquire if any men of war, under foreign commiſſions from any of the parties now in war, do lie hovering near any of his majeſty's ports, havens, or harbours, or ſkulking within any of thoſe ſpaces called the king's chambers, in order to ſurprize merchants ſhips belonging to the king's friends and allies, and to ſnap them as they are coming in or going out of our ports: you are to preſent ſuch, if you know any, and the king's majeſty is to be informed of it out of the records and preſentments of this

(19) The king's chambers are thoſe tracts of ſea which are between ſome of the moſt eminent promontories or points of land (a ſtrait imaginary line being drawn between them), for inſtance, between Flamborough-head and the Storn—between the North Foreland and the South Foreland—between Portland and the Start—between the Land's End and Milford: thoſe chambers being ſo reputed time out of mind, and ſo returned in the year 1604 by jurors, on their oath, to the court of admiralty. See in Sir L. Jenkins, 732, 2 vol. a queſtion ariſing on a capture of a Spaniard by a Portugueze in one of the king's chambers.

court, that they be ſeized and arreſted, if they be driven or do come in, or elſe may be fetched in by his majeſty's ſhips, and puniſhed as wilful violators of the treaties his majeſty hath with his neighbours, and as malicious diſturbers of our trade.

"You are to enquire if any men of war have preſumed to ſearch, ſtop, or carry away by force, any merchant ſhips in their courſe at ſea, under pretence of ſuſpicion that they belonged to their enemies; if they have brought them out of their courſe to their own ports without ſufficient cauſe (20), ſuch as is allowed of by treaty between his majeſty and the prince or ſtate from which the man of war hath his commiſſion; that is a grievous treſpaſs, and the party that hath done it, coming into any of his majeſty's ports may be arreſted, and his ſhip made to anſwer and ſatisfy the merchant's damage. If they have robbed or pillaged them, it is downright piracy, as I have already told you.

"You are to enquire if any foreign men of war have broken the ſafe conduct granted by his majeſty to any of his allies within the four

(20) In Sir L. Jenkins's opinion, even if a foreigner carry away a ſhip belonging to his majeſty's allies, out of one of our ports, it is an offence enquirable and triable before the admiralty commiſſioners of oyer and terminer, and puniſhable with fine and impriſonment, vol. 2. p. 754. Some offences of this kind, by our own captains, have been in modern times puniſhed by the admiralty court.

ſeas (21), or have preſumed to fight or act hoſtilities againſt each other, when any of his majeſty's men of war in ſight, and had given the ſignal to forbear and keep the peace. Theſe rights of the flag of giving ſanctuary, protection, and ſafe conduct, are emanations of his majeſty's ſovereignty in theſe ſeas, and where you know of any thing done to the infringement, or in derogation of them, you are to preſent and ſpecify the particulars, to the end they may be laid before his majeſty, that he may, in his royal wiſdom, provide ſome remedy and redreſs, either by giving orders to his men of war at ſea, or to his officers in port, to arreſt ſuch ſhips and commanders as ſhall have offended in any of theſe particulars, or elſe may, by his miniſters and ambaſſadors abroad, demand ſuch reparation and ſatisfaction as by the law of nations is due.

"Having done with the crimes and offences ſpecially directed in the ſtatute of Henry VIII. we proceed to thoſe to be enquired of upon other ſtatutes (22) related to, and ſpecially cited in the

(21) We have before defined the four ſeas. In a treaty in 1674, between England and Holland, the Engliſh dominion of the ſea was agreed to extend from Vanſtaten, in Norway, to Cape Finiſterre.

(22) The ſtatutes here attended to are ſo very numerous, that I find it neceſſary to refer the reader to the Articuli Magiſtri Roughton, affixed to the laſt edition of Clarke's Practice, where moſt of them will be found under the reſpective heads which they concern.

commiſſion, for the due execution of which the juſtices of that court are ſpecially appointed by his majeſty to be his juſtices of peace and gaol delivery.

"You are to enquire of all nuiſances and abuſes upon our ſalt waters and navigable rivers beneath thoſe bridges that are next the ſea (23); by erecting of water-mills, wears, ſtakes or kiddles, whereby the free courſe and paſſage of boats and veſſels is hindered, or the young fry of fiſh deſtroyed; and you are to preſent as many as are within the limits of that commiſſion (24).

"You are to enquire of all ſuch as have caſt ballaſt, rubbiſh, or filth, into our navigable rivers below the bridges next the ſea (25), or have laid any ſtones for lighters or other boats in the river of Thames, and not laid them a yard deep in the ground, for by that means our harbours and channels come to be choaked up, and the paſſing and riding of ſhips at anchor become daily more and more unſafe.

"You are to enquire of all ſuch as uſe any unlawful arts, engines, nets, or means to catch fiſh

(23) Puniſhment, by 7th article Magiſtri Roughton. Fine at the diſcretion of the admiral.

(24) See ſtatute 9 Henry III. ch. 23. 4 Henry IV. cap. 1. 45 Edward III. cap. 2. 1 Henry IV. ch. 12. 12 Edward IV. cap. 7.

(25) See 24th of the articles aforeſaid from the Liber Niger, and ſtat. 34 and 35 Henry VIII. cap. 9.

withal upon the ſea, or below the loweſt bridges, contrary to the ſtatutes in that behalf provided (26), and contrary to the ancient ordinances of the admiralty; likewiſe ſuch as do deſtroy fiſh out of proper ſeaſons, or while they are of an unſizable growth, and particularly ſuch as dredge for oyſters between the 3d of May and the 14th of September, that is out of ſeaſon, prefixed by the ancient ſtatutes of the admiralty (27).

"You are to enquire of all foreſtallers (28), regraters, and engroſſers of our merchandizes and proviſions, while they are yet upon the ſea, or in our rivers, in the way to our ports or markets, or who divert them from coming to market, thereby to keep up the rate of their commodities. This was anciently felony in ſome caſes, and is ſtill ſeverely puniſhable by law.

"You are to enquire if any uſe falſe weights and meaſures upon the water; if any cuſtomers or comptrollers have ſhips of their trafficing; if any

(26) 4 Henry IV. cap. 11. 13 Edward I. cap. 47. 13 Richard II. cap. 19. 17 Richard II. cap. 9. 1 Eliz. cap. 17. 2 Henry VI. cap. 15.

(27) See 12th article, Magiſtri Roughton. Puniſhment, fine at the admiral's diſcretion.

(28) See 16th article Magiſtri Roughton, by which the penalty was half a years impriſonment; and the ſtatutes 27 Edward III. ch. 11. 28 Edward III. ch. 13. 31 Edward III. ch. 13. 5 and 6 Edward VI. ch. 14. 5 Eliz. cap. 13. 13 Eliz. cap. 25. 21 Jac. cap. 22. 3 Car. I. cap. 4.

do hire and employ foreign bottoms, where there is plenty of our own to be had at reaſonable rates (29). Or if any Cuſtom-houſe officers, water-bailiffs, and others, do exact or receive any illegal fees or gratuities upon the water, to the diſhonour of the government, and to the prejudice of our ports in the point of trade. Touching this, we have a ſpecial conſtitution of king John's in the admiralty, enjoining, that ſtrict enquiry be made after ſuch exactions and extortions.

"You are to enquire, if any perſons have poſſeſſed themſelves of goods or merchandizes caſt away by ſtorms, or elſe ſtranding, bulging, or ſplitting againſt rocks, when any living creature, (though but a dog or cat) is eſcaped with life out of the ſhip or veſſel ſo caſt away; ſuch goods are no wreck, the cuſtody of them belongs to the admiral, and they are to be reſtored to the proprietors without any fees or ſalvage, but what the pains and labour of thoſe that ſaved them may reaſonably deſerve (30).

(29) Sir L. Jenkins here points out one of the great principles on which exceptions are allowed to the navigation act, but then that exception muſt be made by law, and not left to the individual: thus in the preſent reign numerous ſtatutes have paſſed to permit the carriage of certain commodities, and acts of indemnity for thoſe who have permitted it, e. g. for Weſt India governors, 36 Geo. III.

(30) Of this we have treated before in the chapter of Droits.

"You are to enquire of ſuch maſters of ſhips as have willingly or wittingly received any ſilver, gold, plate, or bullion on board them, to be tranſported over ſea, or any commodity prohibited by law to be exported, either abſolutely or without licence, out of the kingdom (31).

"You are to enquire if any maſters or commanders of merchant ſhips, meeting with Turks, pirates, or ſea-rovers, have yielded up their ſhips (32), or ſuffered any goods or merchandizes to be taken from them without fighting, unleſs it were in a caſe where the enemy had more than a double force to theirs; or having ſhips of two hundred tons burthen or upwards, and mounted with ſixteen guns or more, have yielded to any force whatſoever without fighting, ſuch maſters are to be declared for ever incapable of taking the command of any Engliſh ſhip upon them; and if they do, then to ſuffer impriſonment during the ſpace of ſix months for each offence. Or if ſuch maſters of ſhips have accepted of any freight, reward, or gift, from ſuch Turks or

(31) Receiving on board his majeſty's ſhips any goods, other than for the uſe of the ſhip, except gold, ſilver, or jewels, or except goods ſaved from ſhipwreck, unleſs by order of the admiralty, is, by the 18th article of war, puniſhed by caſhiering, and incapacity to ſerve.

(32) This is evidently to prevent fraud or colluſion. The hiſtory of the times will ſhew why Turks and pirates are ſo ſpecially mentioned. See further penalties for not reſiſting pirates in 8 Geo. I. ch. 24.

pirates, either in money or goods; their part of ſuch ſhip (if they have any in it) and all they are worth, is to go to repair the merchants' damages.

"You are to enquire if any mariner, in theſe caſes of meeting with pirates, hath declared or refuſed to join with their maſter and commander to fight and defend their ſhip (33); or if any

(33) By 8 Geo. I. ch. 24. if any commander or other officer or ſeaman of a merchant ſhip which carries guns or arms, ſhall not, when they are attacked by a pirate, fight and endeavour to defend themſelves, or ſhall uſe any words to diſcourage the other mariners, and by reaſon thereof the ſhip ſhall fall into the hands of the pirate, every ſuch commander, &c. ſhall forfeit all the wages due to him, and ſuffer ſix months impriſonment.

And by this ſtatute, and 11 and 12 William III. ch. 7. aſſiſting a pirate, or trading or correſponding with him, are offences puniſhed with death.

In his majeſty's navy, by the articles of war, negligence, cowardice, or diſaffection in the commander, and diſobedience of orders in thoſe under him, are puniſhed with death. So is refuſing to act on pretence of arrears of wages, or any other ſuch reaſons. The puniſhment of cowardice, negligence, or diſaffection in the inferior officers and crew, is left to the diſcretion of courts martial.

The offences of not reſiſting Turks and pirates were firſt noticed by ſtatute 22 and 23 Charles II. ch. 11. which makes the captain, on proof in the court of admiralty, incapable of taking charge of any Engliſh ſhip; and if he doth, ſubjects him to ſix months impriſonment. If any thing be allowed or paid him back by the Turk or pirate, gives an action *in the admiralty* to the owners of the cargo.

mariner has laid violent hands on his commander, thereby to hinder him from fighting, this is made felony. Or if any maſter of an Engliſh ſhip, being at ſea, and having diſcovered any ſhip that had hailed him to be a Turkiſh ſhip, pirate, or ſea-rover, hath departed out of his ſhip, and gone on board ſuch ſea-rover, thereby hazarding his own ſhip, by his detention on board the other. Or if any maſters of ſhips have inſured their ſhips, or taken upon bottomry greater ſums of money than the value of their adventure, and have afterwards wilfully caſt away, or otherwiſe deſtroyed their ſhips, or procured it to be done by others, this is felony.

"The next things I ſhall commend to you, are ſome few things that are made enquirable by the laws of the ſea, and the ancient conſtitutions of the admiralty.

"The firſt relates to the flag: you are to enquire if any maſters or commanders of merchantmen, have preſumed to wear his majeſty's jack, commonly called the union jack, in ſhape or mixture of colours approaching to it, ſo that it cannot be eaſily diſtinguiſhed from the king's jack; or any other flags, jacks, or enſigns whatſoever, than thoſe uſually worn on merchant ſhips, viz. the flag and jack white, with a red croſs, commonly called St. George's croſs, paſſing quite through the ſame, and the enſign red, with a

to be repaired out of it; and empowers all captains of Engliſh ſhips, by virtue of proceſs *out of the admiralty*, to ſeize the ſhips of maſters ſo offending.

croſs on a canton, white within the upper corner thereof next to the ſtaff.

"And if any of our merchantmen, Engliſh, Scotch, Iriſh (34), or belonging to any of his majeſty's dominions and plantations, meeting with any of his majeſty's ſhips or veſſels, carrying his majeſty's flag or jack, have preſumed to approach too near before they did their duty by lowering their topſail; this is an inſolence that our countrymen are ſometimes guilty of: we have known them before the troubles fined ſmartly for daring to come too near the king's ſhip before they ſtruck;

(34) Here he ſpeaks of reſpect to the flag from Britiſh ſubjects, as he did before as from foreigners. As to foreigners, it has ſometimes been the cauſe of a war.

Quæſitum eſt an tota claſſis ordinum expactis his eam reverentiam tenetur exhibere vel uni navi regis Anglici, quæcunque fuerit. Magnis animis ea de re actum & pugnatum eſt annis 1671 & 1672. Cum claſſis ordinum menſe Auguſto 1671, prope terram belgicam ſtaret, Carolus II. in eam immiſit navim quandam luſoriam, *een jacht*, tormentis tamen munitam. Mox navicula illa regia ab Archithalaſſo ordinum exegit ſecundum pacta prædicta reverentiam. Quam cum non præſtaret, ejus navem tormentis petiit Anglica. Carolus, ordinibus jam infenſus, ea occaſione arrepta, iis bellum indixit; for, ſays he, the other aſſigned cauſes of the war were frigidiſſimæ.

This I apprehend is the ſame event related above from Sir L. Jenkins. Bynkerſhoek, Quæs. Juris Publici, lib. 2. ch. 21. In another place he enquires whether yatchts are veſſels of war, and can demand ſalute.

As to our own countrymen, even of late years, proſecutions have not been unfrequent in the admiralty, for negligence in ſtriking colours.

ſome two hundred pounds; nay, ſome five hundred pounds: you are to enquire of theſe men, that teach our neighbours to behave themſelves unmannerly, and give them a pretence to deny an undoubted right of the crown.

"You are to enquire, if any have received and harboured traitors, felons, or outlawed perſons, or enemies of the king, in the late wars, on board any ſhip or veſſel at ſea, or in any harbour or creek, or carried them over ſea. If any during the late wars, have taken any priſoners of war, and afterwards diſcharged, or put them to ranſom, without the king and the admiral's knowledge. Or if any in the late wars have ſtopped any ſhips or veſſels at ſea, belonging to the ſubjects of his majeſty, or his allies, and pillaged them, afterwards letting them go, this is piracy (35); or having taken ſuch as were really prizes from the enemy, and have broken bulk, or embezzled them, or ſubducted the evidence or documents belonging to them, before they brought them to judgment, or elſe accepted compoſition for them, or carried them to foreign ports without bringing them to judgment.

(35) By ſtatute 8 Geo. I. ch. 24. if any perſon belonging to any ſhip, upon meeting any merchant ſhip on the high ſeas, or in any port, haven, or creek, ſhall forcibly board and enter ſuch ſhip, and though they do not ſeize and carry her off, ſhall throw overboard or deſtroy any of the goods, they ſhall be puniſhed as pirates.

"You are to enquire if any ſhips, or mariners, being preſt for the king's ſervice, have been withdrawn, or run away, or left it without a lawful diſcharge. Or if any of the king's ſubjects, or the ſubjects of any of his allies, nay, if any of his enemies in the time of the late war, have been evil intreated by any perſons, acting, or pretending to act, by the king's commiſſion(36), by beating, torturing, or abuſing them, contrary to the law of arms, and the permiſſions and uſages of war; or having any merchantmen in their charge or convoy, have not defended them in all dangers, as men of courage and fidelity ought to do, or have exacted any gratuities or rewards from them contrary to their inſtructions.

"You are to enquire, if any have bought prize goods of any foreign ſhips coming in this time of war from abroad into our ports, without their having ſpecial leave to ſell (37), for their neceſſary victualling or repairs, to enable them to reach their own ports. The buying ſuch goods, where there

(36) If under a foreign commiſſion, it is piracy, by 11 and 12 William III. ch. 7.

(37) Whoſoever ſhall take out of any prize any money, plate, or goods, unleſs it be *neceſſary* for the better ſecuring thereof, or the *neceſſary* uſe of his majeſty's ſhips, before the ſame be adjudged lawful prize in the admiralty court, ſhall forfeit his ſhare of the capture, and ſuch further puniſhment as ſhall be impoſed by a court martial, or by the court of admiralty. See eighth article of war in ſtatute 22 Geo. II. ch 33, ſee alſo 13 Geo. II. ch. 4.

is no ſpecial permiſſion to ſell, being prejudicial to that neutrality which his majeſty is pleaſed to obſerve and maintain towards the ſeveral parties now in war, and againſt ſeveral treaties now in force between his majeſty and his neighbours.

"You are to enquire, if any have taken upon them to conduct ſhips or veſſels as pilots, being not firſt approved of by the Trinity-houſe, and if any veſſels came to miſcarry, or to ſuffer loſs through their negligence or want of ſkill, it was death without mercy by the ancient laws of the ſea. It was death, likewiſe, if any did remove an anchor out of its place, without firſt giving notice to the ſhip it belonged to, if the death of any man, or the loſs of the veſſel enſued upon it.

"You are to enquire of all larcenies, that is, all fraudulent and injurious taking of other mens' goods, without the knowledge of the owners, and in their abſence. Where the thing ſtolen is above the value of twelve pence, it is death by the ancient cuſtoms of the admiralty; if under the value, it is but petty larceny.

"You are alſo to enquire of thoſe that rob and pillage his majeſty's ſtores or proviſions (38), out

(38) By the fourteenth article of war, any perſon in the fleet who ſhall run away with any of his majeſty's ſhips, or any ordinance, ſtores, ammunition, or proviſions belonging thereto, ſhall ſuffer death; and by the twenty-fourth, any waſteful expence of ammunition, powder, ſhot, or other ſtores of the fleet, or any embezzlement thereof, is puniſhable in the offenders, abettors, buyers, or receivers, by a court martial, as it may think juſt.

of any of his ſhips or veſſels, and of thoſe that being intruſted with them, do embezzle or make them away at ſea, or in foreign ports, fraudulently and falſely, contrary to the truſt repoſed in them.

"You are to enquire of thoſe who ſteal anchors and cables (39), long-boats, buoys, or buoy-ropes. He that anciently ſtole a buoy, or buoy-rope, though of never ſo little value, ſuffered death as a felon (40). And of thoſe that maintain and uſe bum-boats, as they call them, upon the river; they are a great abuſe, and, as I may call it now, become a public nuiſance; for young people that are by their maſters intruſted, are under a perpetual temptation to be cheated by thoſe in the bum-boats, till at laſt they become cheats, thieves, and falſe to thoſe that truſt them.

"But above all things you are to look to the honour and ſafety of your ports, that ſtrangers and others may be as ſafe in their ſhips, as in ſo many caſtles, from thieves and robbers by night. And ſuch was the care of our anceſtors anciently for ſtrangers, that if a foreign veſſel, lying in

(39) It was ſo alſo for cutting a cable, if the death of a man was occaſioned thereby; for otherwiſe they were only to make reparation in damages to the amount of the value of the ſhip. See the 40th and 41ſt articles of Magiſtri Roughton; ſee alſo ſtatute 28 Hen. VIII.

(40) The mere ſtealing of anchors in port was puniſhed by forty days imprisonment, article 43.

harbour or port, was robbed in the night, the admiral took ſix or ſeven of the moſt ſufficient neighbours next to the place, and put them in ward till the thief was found out, and the foreigners had their goods reſtored to them, without being bound over to proſecute the thief, the admiral taking on him that care.

"You are to enquire of all mutinies, riots (41), fightings, bloodſhed, maiming, curſing, ſwearing, blaſpheming, in any ſhip or veſſel, within the flowing and reflowing of the waters, particu-

(41) The 1ſt of Geo. I. ch. 25. made perpetual by 9th of Geo. I. ch. 8. recites and puniſhes a ſpecies of riot frequent among ſeamen, &c. but as happening on land, not cognizable in the admiralty; I mean that of workmen in dock-yards, and ſailors about the pay-office, on pay days.

As to mutinies, a very ſevere but temporary act was paſſed 37 Geo. III. ch. 70. in conſequence of the mutiny at the Nore, and has been ſince annually continued to be in force until ſix weeks after the beginning of the ſubſequent ſeſſion of parliament. By this act to ſeduce perſons ſerving in his majeſty's forces by ſea or land from their allegiance, or to make, or endeavour to make, a mutinous aſſembly, or to *commit any traitorous or mutinous practice whatſoever*, is puniſhed with death; and though done on the high ſeas, the offence may be tried before any court of gaol delivery or oyer and terminer in any county in England. Surely the paſſage marked with italics is too vague; but it is a temporary act.

Quarrelling and reproachful words in his majeſty's navy, are, by the 23d article of war, puniſhable by a court martial at their diſcretion.

larly of ſuch mariners as have aſſaulted their maſters, being diſobedient and rebellious againſt their lawful commanders; as alſo of ſuch maſters as treat their mariners inhumanly, and do not pay them the wages they have honeſtly earned.

"Laſtly, there are ſeveral rights and emoluments belonging to the ancient office of high admiral of England, that are at this time, by ſurrender of his royal highneſs, returned to and veſted in the crown, and it has always been the courſe of this court to give them in charge.

"You are to enquire, therefore, of thoſe that have ſeized and taken to themſelves wrecks at ſea, having neither grant nor preſcription whereby they may lawfully do it; of thoſe that have poſſeſſed themſelves of flotſons, jetſons, lagons, derelicts, deodans, treaſure-trouve, the lord admiral's tenths in men of war, royal fiſhes, ſuch as whales, ſturgeons, porpoiſes, ſhares in the caſualties, and ejectmenta maris, the goods of pirates, the goods of enemies in the late wars, the goods of traitors, felons, out-laws, felones de ſe, when lying within the juriſdiction of the admiralty; or of any other rights or perquiſites belonging to that office.

"You are to enquire of thoſe that have broken the arreſts, or refuſed to be aſſiſtant to the officers of the admiralty, in executing the warrants and attachment of the court; of ſuch as in contempt of the juriſdiction of the admiralty have ſued and impleaded others in Guildhall or other courts,

touching matters ariſing within the juriſdiction, and of right belonging to the cognizance of his majeſty's court of admiralty."

Such, and ſo extenſive is the chart drawn by Sir L. Jenkins, of the criminal juriſdiction of the admiralty in his time. But, ſince that period, many of the matters above mentioned have ceaſed, from diſuſe, to be examined into or puniſhed by this court, and many more have been ſubducted from its authority by act of parliament, expreſsly or impliedly. The naval articles of war, eſtabliſhed by act of parliament (42), have, in their effect, taken away numerous ſubjects of juriſdiction, and extend to all the offences therein mentioned, though committed in places within the admiralty juriſdiction, or rather are to ſuch places expreſsly confined. The offences of cowardice, of deſertion, of mutiny, of diſobedience of orders, of quarrelling, of waſte, of embezzlement, are now on board his majeſty's ſhips of war, triable by courts martial, and though the ſtatute (43) preſerves a concurrent juriſdiction to the court of admiralty, it is ſeldom reſorted to.

The chief privilege preſerved to the lord high admiral, or the lords commiſſioners of the admiralty, ſeems to be that of granting the commiſſions which empower naval commanders to aſſemble courts martial; and with reſpect to the *marine* forces, they have been empowered to form their articles of war.

(42) See 22 Geo. II. ch. 33. (43) Sec. 25.

Some ſmaller privileges are alſo expreſsly reſerved to this court, or rather to the inſtance, ſuch as condemning to make reparation for not protecting ſhips under convoy.

By the prize acts, commanders of privateers taking ranſom for captured ſhips, are puniſhable by fine and impriſonment in this court.

If there be any doubt of the authority of the court martial, the power reverts to the court of admiralty, and perhaps is always concurrent in it though diſuſed, for the acts authorizing courts martial, expreſsly take care that the old juriſdiction of the admiralty ſhall not be infringed.

Thus in a caſe mentioned by Jenkins of a pilot, by whoſe ignorance a king's ſhip had been loſt, he gives his opinion, that if he could not be reached by a court martial, he was puniſhable *criminaliter* by the admiralty court.

By the prize act, the offences therein mentioned, though committed out of the realm, may be alledged to be committed in any county in England.

By the ſame act, ſeſſions of admiralty muſt be held twice a year at the Old Bailey, and may be held wherever the lords of the admiralty may appoint.

In all the proviſions relative to this criminal court of admiralty, the juriſdiction of the cinque ports is preſerved. Thus in the 28th of Henry VIII. it is enacted, that when any ſuch commiſſion, as therein the king is empowered to grant,

ſhall be directed to any place within the juriſdiction of the cinque ports, ſuch commiſſion ſhall be directed to the lord warden of the ports, or his deputy, and three or four ſuch perſons as the lord chancellor ſhall name; the inquiſition and trial to be had by the inhabitants in the cinque ports, and the members of the ſame.

The ſame proviſion is made in the 11th and 12th of William, as to the offences puniſhed by that ſtatute.

CHAPTER XII.

OF VICE-ADMIRALTY COURTS.

ALL the powers of vice-admiralty within his majeſty's dominions are derived from the high admiral, or the commiſſioners of the admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commiſſion, the lords of the admiralty are authorized to erect courts of vice-admiralty in North America, the Weſt Indies, and the ſettlements of the Eaſt India company (1).

So in Great Britain alſo, the lord high admiral doth (by virtue of his place) appoint in divers parts of the kingdom his ſeveral ſubſtitutes or vice-admirals, with their judges and marſhals, under the great ſeal of the high court of admiralty, which vice-admirals and judges do exerciſe juriſdiction in maritime affairs, within their ſeveral limits, and in caſe any perſon be

(1) If there had been any doubt of this, it was ſettled by the opinion of great and able civilians, in the caſe of the Sarragoſſa, in 1786.

aggrieved by any ſentence, or interlocutory decree, having the force of a definitive ſentence, (which it has if no other ſentence is to be expected in that cauſe) he may appeal to the high court of admiralty (2).

The court of admiralty in Ireland is not a vice-admiralty court. For its preſent nature and conſtruction I muſt refer to the Iriſh act of 1782; and a clauſe in the act of union, both given in the appendix.

Vice-admirals are removable at pleaſure, notwithſtanding the ſtatute 12 and 13 Edward III. ch. 2. ſec. 3.

The court of admiralty in Scotland is ſometimes called a vice-admiralty court. I am not ſufficiently acquainted with its conſtruction to pronounce thereupon. The appeal, I underſtand, lies to the lords of ſeſſion, from thence to the houſe of lords; but not having been able, after conſulting many books on Scotch law, to get a clear account of it, I ſpeak with heſitation.

The vice-admiralty courts which chiefly claim our attention, are thoſe in America and the Weſt Indies.

Theſe courts, by the proviſions of 12th of Charles II. commonly called the Navigation Act, and 7 and 8 of William III. ch. 22. obtained in a ſingular manner a juriſdiction in revenue cauſes, totally foreign to the original juriſdiction of the

(2) See ſtatute 8 Elizabeth, ch. 5.

admiralty, and unknown to it; and yet, as an appeal lies from theſe courts, in all but prize cauſes, to the admiralty of England, the latter thus entertains revenue cauſes (3) by appeal from the Weſt Indies, which it could not entertain originally.

Theſe courts, being from their remoteneſs, and the liability of minor judges in the plantations to influence, if not to corruption, ſubject to much abuſe, it became neceſſary to control their juriſdiction with a ſtrong hand; and accordingly, by the prize acts, their fees were limited, and their delays puniſhed (4).

Theſe proviſions proving ineffectual, in the laſt ſeſſion of parliament (5) an act was made by which the prize commiſſions of vice-admiralty courts in the Weſt Indies having been previouſly

(3) The caſe of the ſhip *Columbia*, in 1782, is a memorable inſtance. In that caſe Sir James Marriott ſays, the court of admiralty derives no juriſdiction in cauſes of revenue (appropriated by the common law to the court of exchequer) from the patent of its judge, or the ancient juriſdiction of the crown in the perſon of its lord high admiral. The firſt ſtatute which places judgment of revenue in the plantations with the courts of admiralty, is the 12th Charles II.

(4) See 29 Geo. II. ch. 34. and other acts, by which their delays made them ſubject to a forfeiture of five hundred pounds, half to the king, half to the informer; and their fees were limited to ten pounds in judgment on prizes under one hundred tons; if over, to fifteen pounds.

(5) 41 Geo. III. ch. 9

revoked, the king is enabled to make competent proviſion for the judges of three vice-admiralty courts, two of them in any two of the iſlands in the Weſt Indies, and the other at Halifax; their ſalaries not to exceed two thouſand pounds, nor their fees and profits as much more; and his majeſty is empowered to eſtabliſh rules and regulations for the ſaid courts, and to alter and amend ſuch rules.

Theſe courts are enabled by this act to exerciſe juriſdiction over all prizes carried into any of his majeſty's colonies in the Weſt Indies, as if brought into any port of the iſland or colony where the courts are held; and they may iſſue commiſſions for examination of witneſſes, of appraiſement and ſale, or for any other purpoſe of legal adjudication, into any part of his majeſty's territories or colonies in the Weſt Indies or America.

The king may alſo iſſue a commiſſion of prize, whenever he may pleaſe, to any other vice-admiralty court in the Weſt Indies, to be ſubject to the ſame regulations.

From theſe courts, as from inſtance and revenue courts, appeals lie to the high court of admiralty in England; and, ſays Judge Blackſtone *alſo*, to the king in council (6). But this opinion of his ſeems to be relinquiſhed (7). From them, as prize

(6) Comm. 3 vol. ch. 5.

(7) See 2d Robinſon, p. 248, and the note there marked a. The power of the high court of admiralty to receive appeals from the vice-admiralty courts in revenue cauſes,

courts, the appeal lies to certain lords commiſſioners of appeal, conſiſting chiefly of members of the privy council.

As to the appeals from theſe courts in prize cauſes, ſeveral new regulations are adopted by the above mentioned act of 41 Geo. III. which muſt be here enumerated.

The act provides, that if in ſuch cauſes the claimants decline to take the property on bail, in the manner deſcribed above in the tenth chapter, the court, with conſent of captors and claimants, may direct it be ſent to England for ſale; and if the captors unreaſonably withhold their conſent, they ſhall pay the difference of the value at the time of reſtoration, and of the produce, if it had been ſent to England.

The like rule takes place in caſe of appeal, if requeſt be made by appellants. Proceed, if the property be ſold already, to be lodged in the bank. If any difficulty occurs, either party may apply to the high court of admiralty, or lords commiſſioners of appeal.

The ſame ſtatute, after reciting that great inconveniences had ariſen from delays in ſerving the proceſſes of courts of appeal for obtaining appearances, &c. it *enacts*, that in all caſes of cap-

had been diſputed on the ground that they were not in their nature cauſes civil or maritime, but that it was a juriſdiction ſpecially given to the vice-admiralty courts by 7 and 8 Wm. III. ch. 22. which took no notice of any appellate juriſdiction in the high court of admiralty in ſuch caſes; but this point was fully ſettled in favour of this juriſdiction in 1754.

ture by his majeſty's ſhips, ſervice on his majeſty's proctor ſhall be deemed effectual ſervice upon the captain of a king's ſhip; and when the court grants a letter of marque, the owner ſhall appoint a proctor, and ſervice upon him ſhall be deemed ſervice on the commander, in all caſes when an appeal has been lodged within fourteen days. If in another court, they are to have a regiſtered proctor, and the names of the owners to be regiſtered. Owners and their ſureties are parties to all and every part of the proceedings after final ſentence, without further proceſs of contempt.

The act further ſaith, that if no appeal be entered, ſervice of the proceſs upon the commander of kings' ſhips, or his regiſtered agent, or his majeſty's law officers in the court below, or upon the commander of privateers, owners, or either of the ſureties, ſhall be ſufficient ſervice on the parties.

CHAPTER XIII.

OF THE CINQUE PORTS.

THE ports of the county of Kent being particularly liable to invaſion, and in ſome reſpects the key of the kingdom, were always conſidered by our monarchs as ſtations of the utmoſt importance, and the inhabitants of ſome of them (1) honoured with peculiar privileges, liberties, and franchiſes, firſt by William the Conqueror (who orignally created a lord warden of the Cinque Ports) and afterwards by king John, on condition of their providing a certain number of ſhips at their own charge for forty days. Theſe privileges, however, though encreaſed by theſe monarchs, did not originate with them; they are claimed in part by preſcription, and in part by act of parliament

(1) Particularly of *five* of the moſt important, Dover, Sandwich, Romney, Haſtings, and Hythe, to which were afterwards added, Winchelſea and Rye. The men of Kent, from their expoſed ſituation, were always peculiarly celebrated for courage.

and charter, and have been time out of mind (2). With theſe franchiſes, and the peculiar courts and juriſdictions of the Cinque Ports, we have nothing to do, ſave as the juriſdiction of admiral exiſts within theſe ports, exempt from the admiralty of England, which exempt juriſdiction is admitted (3).

This exemption, acknowledged by Lord Coke, is recognized in various acts of parliament. Thus the ſtatutes 2 Henry V. and 28 Henry VIII. ch. 15. directing the proceedings of the lord high admiral of England, in caſes of treaſon and felony, reſerve the cognizance of ſuch cauſes in the Cinque Ports to its own admiral juriſdiction, diſtinct from, and independent of the lord high admiral's juriſdiction.

So by 11 and 12 of William III. ch. 7, it is enacted, that when any commiſſion for the trial and puniſhment of the offences in that act mentioned, ſhall be directed to any place within the juriſdiction of the Cinque Ports, ſuch commiſſion ſhall be directed to the lord warden, or his lieutenant, and ſuch other perſons as the lord high chancellor ſhall name; and every inquiſition and trial to be had by virtue of ſuch commiſſion, ſhall

(2) 4 Inſ. 223. In the time of Edward the Confeſſor, there were three of theſe favoured ports, Dover, Sandwich, and Romney.

(3) 2 Inſ. 556. 4 Inſ. 223. 2 Jones, 67. Sir L. Jenkins, 1 vol. 85.

be by the inhabitants of the Cinque Ports, or the members of the ſame.

And ſo, by 7 Geo. I. continued by 18 Geo. III. ch. 45. the lord warden of the Cinque Ports is to make rules and orders for the government of pilots within his juriſdiction, and in *many* other general acts, exceptions are provided to ſave unimpeached the franchiſes of the Cinque Ports.

I ſhall next briefly conſider how far the admiralty court of the Cinque Ports is exempt from the authority of the admiral of England, as an inſtance, a criminal, or a prize court.

As an inſtance court, no queſtion can ariſe except as to the court of appeal from its deciſions. It has indubitably a right to determine all cauſes, civil and maritime, ariſing within the Cinque Ports (4); but whether the appeal lay to the lord warden of the Cinque Ports, or to the judge of the high court of admiralty of England, has been a queſtion ſtrongly litigated; for the arguments on both ſides of which queſtion, the reader muſt be referred to the remarkable caſe of (5)

(4) What are the limits of the Cinque Ports has therefore often been a queſtion. Whether they are confined to the harbours, or extended to the *Downs* and other places. On theſe limits I am not aſhamed to ſay I am uninformed, ſince I have ſeen late opinions of great Engliſh civilians making the ſame acknowledgment.

(5) 2 Jones, p. 67.

Civil droits come within the province of the inſtance court; but if a veſſel of the Cinque Ports finds a derelict at ſea, without the limits of thoſe harbours, it is a droit of admiralty, and the ſubſequent bringing of it into thoſe harbours doth not ouſt the ordinary admiralty juriſdiction of England (6).

In the ſame manner, if a prize be taken at ſea by a non-commiſſioned veſſel of the Cinque Ports, there is no doubt that it is a droit of the admiralty of England; but great diſputes have ariſen whether if taken within the Cinque Ports, they are droits of the admiralty, or of the lord warden.

This leads to the general queſtion, whether the lord warden of the Cinque Ports, or his deputy, has any *prize* juriſdiction?

On this head I can only ſay, that I have ſeen an opinion of an eminent civilian (7), confirmed in ſubſtance by that of another (8) ſtill more eminent, both given in 1781, that the lord warden's right to *prize* droits (and therefore I think it muſt follow to prize juriſdiction in general) was fully eſtabliſhed by ancient and immemorial uſage, and conveyed to him by the general terms of his

(6) This appears, from opinions given to the lords of the admiralty, on caſes by them referred, as to certain Dutch wrecks found at ſea, by veſſels of the Cinque Ports, in 1763, which the author has ſeen.

(7) Dr. Bever. (8) Sir William Wynne.

patent. But on the other hand, in the famous caſe of the Oeſter Eems, 1783, it ſhould ſeem that one of the great civilians (9) above alluded to, had changed his opinion, for he did, in concurrence with three other eminent council, give his opinion upon that occaſion (10), that if the ſaid ſhip was to be conſidered as a droit of admiralty, it did not paſs to the lord warden (11) by his grant, *there being no mention therein of prizes and captures, either by ſea or land, within the juriſdiction of the Cinque Ports.*

As to crimes committed within the bounds of the Cinque Ports, the lord warden of the Cinque Ports has a juriſdiction excluſive of the admiralty of Great Britain; but as in the latter court criminal proceedings, under its primitive juriſdiction, have entirely given way to thoſe under the ſtatute of the 28th of Henry VIII. (12) ſo they may be

(9) Sir William Wynne.

(10) This opinion was ſubſcribed with the names of three others, viz. R. P. Arden. W. Scott. F. C. Cuſt.

(11) Then Lord North.

(12) See ante chapter the eleventh. There are ſeveral caſes in Croke's Reports relative to the Cinque Ports worthy of notice, in which it was determined, amongſt other matters, that prerogative writs, ſuch as habeas corpus, mandamus, &c. run there; that an appeal lies in the king's bench for a murther in the Cinque Ports; and that a certiorari lies to remove an indictment for felony in the Cinque

preſumed to do in the one firſt mentioned, that of the Cinque Ports.

It muſt be obſerved, that the courts within the Cinque Ports are various; a court before the mayor and juriſts of each port; a court before the conſtable of the caſtle of Dover; and a court of the Cinque Ports, *apud Shepway*; and much confuſion has ariſen from not diſtinguiſhing between theſe courts (13).

Where a veſſel has been taken as prize within the verge of the Cinque Ports(14), and the cognizance

Ports. See Cro. Car. 247, 253, 264. In the year 1751, a robbery having been committed on board a ſloop of war in the port of Dover, the following opinion was given by a counſel of eminence:

"If the robbery was committed within the bounds of the "Cinque Ports, the lord warden has juriſdiction excluſive "of the admiralty of England; and in ſuch caſe, the lords "of the admiralty cannot direct a court martial.

"If the place where the fact was committed be within "any county, the proſecution will be moſt proper at the "aſſize of that county. If not within any county, the trial "may be before the lord warden and his aſſiſtants, or by a "ſpecial commiſſion of oyer and terminer, under the ſtatute "of 28 Henry VIII"

(13) Thus Cro. Car. 252, 264. The mayor and jurats of one of theſe ports, though an indictment was taken before them as juſtices of peace, erroneouſly ſuppoſed that a certiorari to remove it was to be directed to the lord warden.

N. B. It is ſaid, Cro. Car. that the Cinque Ports, though a liberty created by act of parliament, always remain parcel of the county.

(14) It is evident that the lord warden could never pretend even to any cognizance of prize taken at ſea, and merely brought into the Cinque Ports.

of its adjudication claimed by the lord warden, it has not been unuſual for the captor, notwithſtanding, to return the papers into the admiralty of England, and for the claimant from thence to iſſue a monition to proceed to adjudication, (and then the cauſe attaches there) to which monition the lord warden has ſometimes appeared to claim his alledged privileges, as in the caſe of the Oeſter Eems, but without ſucceſs.

In the letters of Sir L. Jenkins, we find a commiſſion of review granted by the lord warden of the Cinque Ports, of a ſentence given by the admirals thereof, and his opinion that this could not be reverſed by the crown, though it might by a court of *Sheppey*.

CHAPTER XIV.

OF CONSULS.

WHEN trade and commerce began to flouriſh in modern Europe, and controverſy thence to ſpring, reaſon dictated to merchants and mariners the deſire of a court formed of men acquainted with trade and maritime affairs. Permiſſion to erect ſuch tribunals was ſoon obtained from various princes; and vanity, perhaps, inſpired the idea of giving to theſe minor judges the magnificent appellation of conſuls (1).

The inſtitution is a kind of court-merchant, to determine affairs relative to commerce in a ſummary way. Their authority depends very much on their commiſſion, and on the words of the *treaty*, or the extent of the *permiſſion* on which it

(1) I muſt refer the reader for the origin, nature, and power of the office of conſuls, as firſt eſtabliſhed, particularly in Spain, to the Conſolato del Mare, which begins with a large diſcuſſion of the ſubject from which it takes its name.

is founded. In France and Spain the office is viewed in a twofold light, domeſtic and foreign: in England only in the latter, we having no conſular eſtabliſhment *within* the united kingdom of Great Britain and Ireland to ſettle diſputes between our own traders (2).

The firſt juriſdiction of conſuls in France was that of Tholouſe in 1519.

Acts made in foreign countries are not valid in France, unleſs made legal by the conſul. Their conſuls abroad have a chancery (3) and regiſtry. They are to authenticate inſtruments, to take inventories of the goods of their countrymen who die abroad, and of effects ſaved from ſhipwreck; and they are a criminal court, without appeal, with reſpect to offences among their compatriots, not inducing corporeal penalty, which if they do, the conſuls are to ſend the criminals home to be tried by the laws of their country (4).

Our Engliſh conſuls are to take care of the affairs of our trade, and of the intereſts, rights, and pri-

(2) The want of ſuch a tribunal has occaſioned the merchants in many ſea-ports to form a kind of domeſtic judicature, or ſociety of arbitrators, by conſent amongſt themſelves, to decide mercantile diſputes.

(3) We have heard too much of the *chanceries* of the French conſuls in Norway, in Sweden, taking upon them to condemn prizes in the late war.

(4) I apprehend, however, for enormous crimes, as murther, the legiſlature of the country where the fact happened, would ſcarcely leave this liberty to the conſul.

vileges of our merchants and ſeamen in foreign countries.

Their authority will be beſt illuſtrated by reference to the various acts of parliament relative to their duties (5), and by the caſes inſerted in the Appendix for the purpoſe of its further illuſtration. Even where they have expreſs authority, it is the conſtant practice, and moſt uſeful reſource of all commercial ſtrangers and mariners, to apply in matters of any difficulty or embarraſſment to the conſul of their nation for advice and aſſiſtance; and he is the natural arbitrator of all their diſputes.

To ſum up briefly the points moſt material to be known as to *conſuls*—they are, that their powers may be founded in treaty or in permiſſion; and that the powers of the former are generally

(5) To enumerate all theſe would be too long a taſk. One or two may ſerve by way of example. By 8 Geo. I. ch. 17. the conſuls in Portugal may call a general meeting of merchants and factors, and may, with the conſent of a majority, levy certain ſums from all ſhips trading there, for the relief of ſhipwrecked mariners and other charitable purpoſes. By 9 Geo. II. ch. 25. and 10 Geo. II. ch. 14. the like power is given to conſuls in Spain and at Leghorn. By other ſtatutes he is to relieve all diſtreſſed Britiſh ſeamen and merchants, to allow them ſixpence a day for their ſupport, to ſend them home in the firſt Britiſh veſſels that ſail, and to give free paſſes to all poor Britiſh ſubjects returning home. But for further particulars of a Britiſh conſul's privileges and duties, I muſt refer the reader to this head in Beawes's Lex Mercatoria.

greater, and always leſs diſputable; and to know with preciſion what powers are claimed by any particular conſul, his commiſſion muſt in the firſt inſtance be referred to. That a conſul is not a public miniſter, but in general a perſon converſant and employed in trade, and liable to the *lex loci* both civil and criminal, and therefore I conceive not exempt from arreſts even in civil ſuits. That his privileges, ſuch as exemptions from certain taxes or burthens, depend in each place, if not on treaty, upon cuſtom. That they are not with us elected, as of old, by the merchants, but appointed by the ſecretaries of ſtate. And that their proper buſineſs is to protect and aſſiſt the perſons and trade of their own countrymen abroad; ſettle, if poſſible, diſputes or controverſies between them; and, if neceſſary, convey their complaints to the government of the place.

CONCLUSION.

THE plan of this work being now executed, which, however confined in its compaſs, purports at leaſt to be original in its deſign and plan as an admiralty treatiſe; and to guide the reader to thoſe ſprings in which he may gratify his thirſt for

knowledge on points it has not room to reſolve, one queſtion, perhaps, may with ſome remain unſatisfied, viz. Why is the law of the admiralty thus connected, blended with, and adjoined to a treatiſe on the civil law? If it be poſſible that a careful peruſer of this work ſhould, after reading it, put ſuch a query, and inſiſt on the brevity of diſcuſſion in the Roman code of all ſubjects relative to maritime affairs, I anſwer him thus: Let it be firſt conſidered, whether the marine laws of Rome, though ſhort and conciſe, have not been our great and principal guides on ſome moſt important ſubjects.—On the nature and effects of the contracts of maſters and mariners—on average and contribution—on queſtions relative to the colliſion of ſhips—on the law as to ſhipwrecks—on hypothecations—on nautical intereſt—all our *principles* are derived from them. As to *practice*, how can the practice of the admiralty court be intelligible without knowing the practice of the civil law? *The court of admiralty*, ſays the great Lord Hardwicke, if any authority was wanted, *always proceeds according to the rules of the civil law, except in caſes omitted* (6). But this is a mode of addreſſing thoſe only whoſe ideas upon the ſubject are groſs or vague. The profound civilian knows that the *maxims* of the Roman law are founded in general wiſdom, and applicable to every ſubject. The general rules, that prima facie, at leaſt *ne-*

(6) See 1 Atkyns, 295.

minem alterius contractu obligari debere; that *pacta contra leges,* and *bonos mores non valere;* that *qui facta ſuorum hominum præſtare debet. præſtare debet et ipſe,* and the like, are either *univerſally* or *generally* received through the civilized world.

But this is not all. Great civilians, who firſt extracted the principles of modern naval laws from the treaſures of the Roman code, did not find them there under the ſame denomination. They did not look into the Rhodian law, to determine whether ſhips recaptured ſhould be reſtored on ſalvage to their former owners, but to the rules, as to *Jus Poſtliminii,* moſtly given under the head of *Paternal Power.* They did not find the doctrine of droits, in the law *De Nauſragiis,* but in that *De Jure Fiſci.* They traced the limits of *contraband,* and the queſtion whether the innocent mariner ſhall be paid his freight, though the contraband cargo of the freighter be ſeized, not in any naval code, but in the general laws of exportation, and of mortgages or pledges, *Quæ res exportari non debeant,* and *Si pignus publicetur. tamen jus pignoris non extinguitur.* Inſtances might be multiplied without number (7); but theſe may ſuffice to ſhew, that it is not merely to the *ſubject* we are to look, but to the *principles*

(7) Such as the application of the laws *De Pauperie,* and *De Incendio,* to the colliſion of ſhips; *De Tabernis,* and *Inſtitoribus,* to the effects of the torts of maſters of ſhips upon owners, &c. &c.

of the *deciſion*, and the *reaſons* on which it is founded. Where theſe reaſons appear to extend to things in general, and to be applicable to naval affairs as well as others, they have been by able and ingenious men ſucceſsfully ſo applied.

In the commencement of the work, the obſervation of the celebrated Bynkerſhoek was mentioned, that *in iis quæ ſola ratio commendat, a jure Romano ad jus gentium tuta fit collectio;* and that of the firſt of the civilians of theſe days, that *great part of the law of nations is founded on the civil law*—I ſhall conclude with the emphatic exclamation of the foreign juriſt, ſpeaking of this illuſtrious code, *Ubi parem prudentiam invenire eſt?*

APPEN-

APPENDIX.

No. I.

FROM THE PETERSBURGH COURT GAZETTE*.

Copy of the Convention with the Court of London, ſigned at Peterſburgh, June 17, 1801.

IN THE NAME OF THE MOST HOLY AND INDIVISIBLE TRINITY.

THE reciprocal deſire of his majeſty the emperor of all the Ruſſias, and of his majeſty the king of the united kingdom of Great Britain and Ireland, being not only to come to a good underſtanding relative to the diſputes, which, on a late occaſion, interrupted the harmony and the relations of friendſhip which ſubſiſted between the two ſtates, but alſo to prevent, for the future, by candid and unequivocal explanations with regard to the navigation of their reſpective ſubjects, the recurrence of ſimilar altercations, and of the unpleaſant circumſtances which might enſue; and the object of their ſaid majeſties' ſolicitude being to bring about, as ſoon as can be conveniently done, an equitable adjuſtment of ſuch diſputes, and invariably to ſettle their principles on the rights of neutrality, as applicable to the reſpective monarchies, in

* The Ruſſian treaty is inſerted in the Appendix, becauſe it ſo clearly illuſtrates the ſeventh chapter on Prize Law.

order to be united in cloſer bonds of friendſhip, of which they acknowledge the utility and the advantages, have appointed for their reſpective plenipotentiaries, namely, Count Panin, &c. and Alleyne Lord St. Helens, &c.

Art. I. There ſhall be henceforward between his Imperial Majeſty of all the Ruſſias, and his Britannic Majeſty, their ſubjects, ſtates, and countries, a ſolid and a laſting friendſhip; all the political and other relations of commerce, advantageous to their reſpective ſubjects, ſhall exiſt as heretofore, without being liable in any manner to be diſturbed or interrupted.

II. His Majeſty the Emperor and his Britannic Majeſty declare it to be their will moſt rigorouſly to enforce due obedience to the articles which relate to the contraband trade of their ſubjects with the enemies of either of the high contracting parties.

III. His Imperial Majeſty of all the Ruſſias and his Britannic Majeſty having reſolved to place the freedom of commerce and of navigation under a ſufficient ſafeguard, in caſe that one of them ſhould be at war while the other remained neuter, have agreed as follows:—

1ſt. That the ſhips of the neutral power may freely ſail to the ports and coaſts of the belligerent nations.

2d. That the goods put on board the neutral ſhips ſhall be free, excepting at all times warlike ſtores and property of the enemy: and it is agreed upon not to include among the latter the merchandiſe which ſhould prove to be the produce, the growth or manufacture of the country at war, purchaſed by the neutral power and for its uſe; which merchandiſe, in no caſe whatever, ſhall be excepted from the liberty granted to the flag of the ſaid power.

3dly. That to avoid all ambiguity with regard to what is to be conſidered as warlike ſtores, the contracting ſovereigns declare, agreeably to the XIth article of the commercial treaty, concluded between the two crowns on the 21ſt of

February, 1797, that they only conſider the following objects as ſuch, viz. cannons, mortars, fire-arms, piſtols, bombs, grenades, balls, bullets, muſkets, flints, matches, powder, ſaltpetre, ſulphur, cuiraſſes, pikes, ſwords, belts, pouches, ſaddles, bridles, excepting, however, what of the above may be neceſſary for the defence of the ſhip and the crew, and all the other articles not mentioned herein, ſhall not be reputed warlike or naval ſtores, nor ſubject to confiſcation, and conſequently ſhall paſs unmoleſted and untouched, unleſs they prove to be the enemy's property.

It is alſo agreed upon, that what is ſtipulated in the preſent article ſhall not infringe on the particular ſtipulations of either crown with other powers, by which objects of that nature would be prohibited or not.

4thly. That in order to determine what characterizes a blockaded port, that denomination ſhall be only applied to the port in which, according to the diſpoſition of the power which attacks it, with ſhips ſtationed near it, there ſhall be evident danger of entering.

5thly. That the veſſels of the neutral powers ſhall not be ſtopped but on juſt grounds, and in conſequence of evident facts: that their fate ſhall be immediately decided upon, and the proceſs be always uniform, ſpeedy, and agreeably to law.

The better to enforce the reſpect due to theſe ſtipulations, dictated by the ſincere deſire of conciliating the reciprocity of intereſts, and to give a freſh inſtance of their good faith and their regard for juſtice, the high contracting parties here moſt formally engage to renew the moſt ſevere prohibitions both to their officers commanding ſhips of war, and to maſters of trading veſſels, againſt having on board any of the objects which, according to the tenor of the preſent convention, may be conſidered as contraband.

IV. The two high contracting parties, willing ſtill further to prevent, for the future, every ſubject of diſcuſſion, by circumſcribing the right of viſiting merchantmen ſailing

without convoy, only in caſe that the belligerent power might experience a real injury by the abuſe of the neutral flag, have agreed,

1ſt. That the right of viſiting merchant ſhips belonging to the ſubjects of one of the contracting powers, and ſailing under convoy of a ſhip of war of the ſaid power, ſhall not be reſorted to but by the ſhips of war of the belligerent party, and ſhall never extend to private ſhips, to privateers, nor other veſſels not belonging to the imperial or royal fleet of their majeſties, but armed for war by their ſubjects.

2dly. That the owners of all the merchant ſhips belonging to the ſubjects of one of the contracting ſovereigns, deſtined to ſail under convoy of a ſhip of war, ſhall, before they receive their final inſtructions for ſailing, exhibit to the commanding officer of the ſhip of war their paſſports, certificates, or letters of ſervice.

3dly. That when ſuch ſhip of war, having merchantmen under its convoy, ſhall be met by a ſhip or ſhips of war of the other contracting party then at war, in order to avoid all confuſion, they ſhall reſpectively ſtand out of the range of cannon ſhot, unleſs the ſtate of the ſea, or of the place where the meeting takes place, ſhall require them to approach; and the commanding officer of the ſhip of the belligerent power ſhall ſend a boat on board the convoying ſhip of war, where the papers and certificates ſhall be reciprocally verified; and prove that the neutral ſhip of war is authorized to take under its protecting care ſuch and ſuch merchantmen of his nation, having ſuch a cargo on board, and bound for ſuch a port; on the other hand, that the ſhip of war of the belligerent power belongs to the fleet of their imperial or royal majeſties.

4thly. After ſuch verification, no further viſit ſhall take place, if the papers be found in due form; ſhould the contrary, however, prove to be the caſe, the commanding officer of the neutral ſhip of war (being ſo required by the com-

manding officer of the power at war) muſt bring to, in order that the merchantmen may undergo a ſearch, which ſhall take place in his preſence on board each ſhip.

5thly. If it happen that the commanding officer of the ſhip belonging to the power at war, having examined the papers on board, and having queſtioned the maſter and the crew, ſhall find juſt and ſufficient reaſons to detain the merchantmen, for the purpoſe of making a further ſearch, he ſhall ſignify to the other officer that ſuch is his intention: the veſſel ſhall then be carried into the next port for the purpoſe above-mentioned.

V. It is alſo agreed upon, that if any merchant ſhip, thus under convoy, be detained without juſt and ſufficient cauſe, the commanding officer of the ſhip belonging to the ſtate at war, ſhall not only be held fully reſponſible to the owners of the veſſel and cargo for the loſs ſuſtained by them in conſequence of ſuch detention, but that he ſhall alſo be anſwerable for any act of violence, &c. offered on the occaſion; on the other hand, the veſſel to be ſearched muſt, on no poſſible account, oppoſe reſiſtance to the will of the ſovereign's officer.

VI. The high contracting parties ſhall give preciſe and unequivocal orders that the ſentence pronounced on prizes thus made, be agreeable to the rules of the moſt rigorous juſtice and equity, that they be delivered by faithful judges, unintereſted in the tranſaction; the government of the reſpective ſtates ſhall take care that ſuch ſentences be duly and promptly executed, according to the forms preſcribed.

When veſſels are detained without juſt cauſe, or the ſtipulations violated, the owners ſhall be indemnified in proportion to the injury they may have ſuffered.

VII. In order to obviate all the inconveniencies likely to reſult from want of good faith in thoſe who ſail under the flag of a nation to which they do not belong, it is ſettled definitively that a veſſel, in order to be conſidered of the na-

tion under the flag of which ſhe ſails, muſt have the captain and half her crew of that country, and all her papers and paſſports in due form; and that all veſſels not acting agreeably to the above regulations, ſhall be exempted from the rights and protection of the ſaid flag.

VIII. The principles and meaſures adopted by the preſent act ſhall be likewiſe applicable to all maritime wars in which either of the two powers may be engaged, while one of them ſtands on neutral ground; ſuch ſtipulations are to be conſidered as permanent, and ſhall be the criterion of the contracting powers, in all that regards trade and navigation.

IX. His majeſty the king of Denmark, and his majeſty the king of Sweden, ſhall be immediately invited by his Imperial Majeſty, in the name of the two contracting parties, to accede to the preſent convention, and at the ſame time to renew and confirm their reſpective treaties of commerce with his Britannic Majeſty; and his aforeſaid majeſty engages by the means of the acts which ſhall corroborate this agreement, to reſtore to both theſe powers all the prizes taken from them, as well as the territories captured by the arms of his Britannic Majeſty ſince the commencement of hoſtilities, in the ſtate they were in when captured.

X. The preſent convention ſhall be ratified by the two contracting parties, and the ratifications exchanged at St. Peterſburgh, within the ſpace of two months at fartheſt, reckoning from the day of the ſignature.

In faith of which the reſpective plenipotentiaries have cauſed duplicates of it to be drawn out, perfectly alike, ſigned by them, and ſtamped by their arms.

Given at St. Peterſburgh, the 17th of June (5th) 1801.

(L. S.) N. COMTE DE PANIN
(L. S.) ST. HELENS

No. II.

Extract from the Iriſh Act 1782.

WHEREAS it is expedient to regulate the high court of admiralty in this kingdom, and the mode of appealing therefrom: Be it enacted, by the king's moſt excellent majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons, in this preſent parliament aſſembled, and by the authority of the ſame, that his majeſty, his heirs and ſucceſſors, ſhall and may from time to time nominate, conſtitute and appoint, under the great ſeal of this kingdom, one fit and diſcreet perſon to be judge of the high court of admiralty in this kingdom, to have and hold ſaid office ſo long as he ſhall behave himſelf well therein; and that the perſon ſo to be nominated, conſtituted and appointed, ſhall have full power and authority to hear and determine all, and all manner of civil, maritime and other cauſes to the juriſdiction of the ſaid court belonging, or which of right belong thereto, according to the laws and ſtatutes of this realm.

Provided always, that it ſhall and may be lawful to and for his majeſty, his heirs and ſucceſſors, to remove ſuch judge, upon the addreſs of both houſes of parliament, any thing herein to the contrary thereof in any wiſe notwithſtanding.

And be it further enacted, by the authority aforeſaid, that it ſhall and may be lawful for any perſon or perſons, who ſhall be aggrieved by any ſentence, order, or adjudication of the ſaid court, to appeal to the king, or to his lieutenant, or other chief governor or governors of this kingdom, in the high court of chancery in this kingdom, and that upon every ſuch appeal, the chancellor, keeper or keepers of the great ſeal, ſhall grant a commiſſion or delegacy to ſome diſcreet and well learned perſons of this kingdom, un-

der the great ſeal thereof, which commiſſioners or delegates, ſo to be appointed, and none others, ſhall have full power and authority finally to hear and determine all cauſes and grievances contained in ſuch appeals, as well in the principal matter as all circumſtances and dependants thereon.

Extract from the Act of Union between England and Ireland, 40 George III.

It is enacted, that it be the *eighth* article of union, that all laws in force at the time of the union, and all the courts of civil and eccleſiaſtical juriſdiction within the reſpective kingdoms, ſhall remain as now by law eſtabliſhed within the ſame, ſubject only to ſuch alterations and regulations from time to time as circumſtances may appear to the parliament of the united kingdom to require. Provided, that all writs of error and appeals depending at the time of the union, or hereafter to be brought, and which might now be finally decided by the houſe of lords of either kingdom, ſhall from and after the union be finally decided by the houſe of lords of the united kingdom. And provided, that from and after the union there ſhall remain in Ireland an inſtance court of admiralty, for the determination of cauſes, civil and maritime only, and that the appeal from ſentences of the ſaid court ſhall be to his majeſty's delegates in his court of chancery, in that part of the united kingdom called Ireland; and that all laws at preſent in force in either kingdom, which ſhall be contrary to any of the proviſions which may be enacted by any act for carrying theſe articles into effect, be from and after the union repealed.

No. III.

Extracts from Opinions relative to the Power of the Admiralty to try Miſdemeanors.

THE Eſpiegle ſloop of war having, in 1796, ſent a boat to ſeize a ſmuggler, ſeveral ſhots were fired at the boat by the crew of the ſmuggler. The perſons who fired were put into confinement.

With reſpect to the perſons under confinement, we think it extremely doubtful, whether any criminal proceedings could be inſtituted againſt them under the ſtatute of Hen. VIII. no proceeding of that nature againſt perſons charged with *miſdemeanors* appearing to have been inſtituted with effect for the laſt hundred years. Though we are aware of great difficulties attending a reſort to the common law juriſdiction of the admiralty, ariſing from its having gone into great diſuſe, we think upon the whole it is fit to be attempted in this caſe. If on a full affidavit of the facts, the judge decline to iſſue his warrant againſt the perſons, it may be matter of proper conſideration, whether an indictment againſt them for a *confederacy* ſhould not be preferred under the admiralty commiſſion uſually ſitting at the Old Bailey.

W. SCOTT.
J. SCOTT.
W. BATTINE.

In 1796, the Unicorn frigate having taken a ſmuggler, the ſailors put on board her from the frigate were aſſaulted and beaten by the ſmugglers.

This offence is only a miſdemeanor, and I am not aware of any inſtance of a proſecution for a miſdemeanor under the ſtatute 28 Hen. VIII. ch. 15. That ſtatute gives no juriſdiction over miſdemeanors in general, but confines it to treaſons, felonies, robberies, murthers, and *confede-*

racies. It may be a point worth trying, whether this offence may not come under *confederacies* *; if the caſe be not comprehended under the ſtatute, it ſeems diſpuniſhable, without a new law, for I believe the criminal juriſdiction of the admiralty, except as exerciſed under the above ſtatute, is obſolete.

SPENCER PERCIVAL.

Though indictments were anciently preferred for confederacies where no capital offence had been committed, yet for a century, or thereabouts, no ſuch proceeding has been had under the commiſſion at the Old Bailey. There ſeems to be ſome difficulty alſo in aſcertaining, whether the proceedings in the ancient caſes were under ſuch part of the commiſſion as was founded on the ſtatute, or ſuch part as was founded in the original juriſdiction of the admiralty; and it appeared to me that if the proceeding was to be upon the latter, it was underſtood to be materially different (if the nature of it at this day can be accurately aſcertained) from the proceedings to be had under the ſtatute. If I recollect rightly, Sir George Paul, and the other law officers of his time, felt the difficulty of proceeding under the ſtatute ſo much, as to adviſe, in caſe of miſdemeanors, the proceeding in the admiralty court acting upon its original primitive juriſdiction, though I do not recollect that miſdemeanors, except ſome few of a particular claſs, have been ſo proſecuted, notwithſtanding the difficulty of proſecuting miſdemeanors committed at ſea has been felt as a grievance. J. SCOTT.

Two ſailors had, in the year 1798, behaved mutinouſly and inſolently on board a veſſel whoſe letters of marque were irregular and void.

We are of opinion, that theſe ſailors are not amenable to a court martial; and their offence being ſimply that of a *miſdemeanor* committed *at ſea*, we are of opinion that they can-

* The objection to this depends upon a quere, whether the word means only ſuch confederacies and conſpiracies as have for their object the perpetration of ſome one of the offences before ſpecified, viz. treaſon, &c. or has a more extenſive ſenſe, and comprehends all conſpiracies.

not be tried at all, as there is no court in exiſtence before which, according to modern practice, ſuch miſdemeanors can be tried. JOHN MILFORD.
SPENCER PERCIVAL.

All theſe eminent council united in what muſt be the wiſh of every man, for an act of parliament to remedy this evil.

No. IV.

Notes of ſome adjudged Points of Maritime Law, illuſtrative of the foregoing Treatiſe.

1743. A merchantman had been taken and reſcued by the crew. The owner of the ſhip reſcued, refuſed to deliver the priſoners, i. e. the perſons put on board the ſhip reſcued by the enemy, and thus captured, to the commiſſary of priſoners, without being paid five pounds a man and ſubſiſtence. He had no claim to bounty money under 13 George II. the action in which the priſoners were taken not having been an engagement in his majeſty's ſervice, and for annoying the enemy, but for the private intereſt of the owner,

1743-4. The governor and company of Rhode Iſland obſtructed Mr. Lockman, appointed by the lords of the admiralty judge of the admiralty there, in the execution of his office. He refuſed to ſwear the deputy judge appointed by him, and undertook to appoint a deputy themſelves. They afterwards ſubmitted.

1744. A ſailor belonging to one of his majeſty's hired tenders was wounded by the mate of the tender, then lying in the river Thames, of which wound he died. Dr. Strahan was of opinion, that the fact having been committed in the

river, and *below bridge*, the lords of the admiralty might grant their warrant to the marſhal of the admiralty to take the offender into cuſtody, and that the *marſhal* of the admiralty being alſo the *coroner* of the admiralty, the lords of the admiralty might direct him to ſummon a jury, view the body, and report to them.

1744. An officer of a man of war going on board a privateer to demand deſerters, was treated with great inſolence. A monition adviſed to be iſſued againſt the captain of the privateer, to anſwer articles to be exhibited by his majeſty's proctor.

1744. A ſubject of the States General, ſeveral years in the French ſervice, but diſcharged, and with his wife, a paſſenger on board a French man of war, on his way home to Holland was taken. He was not to be conſidered as a Frenchman, but diſmiſſed, and his property reſtored.

1745. *Tripoly* being no part of his majeſty's dominions, a vice-admiralty court to condemn prizes brought into that port, it was agreed could not be granted by law*.

1746. A man, though involuntarily kept abroad above three years, ſo as to be out of the way of claiming his ſhare of prize, was thought, however hard the caſe, to have forfeited it to Greenwich hoſpital. See 3 George II.

1746 The merchants of Oporto wanted to get letters of marque ſent out with blanks for the names of the ſhip and maſter. It could not be done.

1746. A prize had been driven on ſhore by a man of war; the crew of a tender impeded in plundering, burnt the prize maliciouſly. Proceeding againſt them by indictment at the admiralty ſeſſions was the mode adviſed.

1747. Articles exhibited in the admiralty court againſt the captain of a privateer for demanding ſhot-money.

* Here Britain diſavowed any ſuch power as France of later years attempted to ſet up in Norway.

1747. A ſloop belonging to Rye fired at and ſtopt a Norway veſſel; the captain whereof having refuſed to pay for the ſhot, the commander of the ſloop took away, by force, ſhirts and other property. Articles adviſed to be exhibited againſt him in the admiralty, to make him reſtore what he illegally detained, and to condemn him in damages.

1747. The centry on board a ſhip in Portſmouth harbour fired at a boat, without cauſe, and killed a boy therein. It was held that Portſmouth harbour was within the admiralty juriſdiction, and that the vice-admiral of the county, or his deputy, as coroner, might hold an inqueſt on board; but he not having done ſo, and the coroner of the county having held an inqueſt on ſhore, ſummoning witneſſes from the ſhip, it was held that the admiralty juriſdiction was waved, and the trial was at the aſſizes.

1750. The judge of the admiralty in Ireland complained to the lords of the admiralty, that he was impeded in his juriſdiction as to goods flotſam; they were goods thrown overboard by a ſmuggler purſued by a revenue cutter. He was anſwered, that if the goods were forfeited by the laws of the cuſtoms, it was a queſtion for the court of exchequer, even though the queſtion of flotſam ſhould incidentally ariſe. He complained alſo, that having ſeized Dublin ſhips, clandeſtinely trading with enemies during the then late war, and attached their captains for reſcuing them, replevyns had been brought, and he eſtopped by the court of king's bench. He was anſwered, that if the replevyns were not well founded, the truth of the caſe might be pleaded, and if it was really a matter of prize, the court of king's bench would not take cognizance of it; but that this mode of complaint was indecorous. The matter had been referred to Sir Dudley Rider, and Mr. Murray, attorney and ſolicitor-general.

1751. Mr. Read, appointed by letters patent marſhal and ſerjeant of the mace of the admiralty in Ireland, and water-

bailiff through that kingdom, claimed all anchorage and profits thereof. The city of Dublin claimed under their charter, granting them all droits and perquiſites of admiralty in the port of Dublin, anchorage therein. It was held that anchorage is not a droit of admiralty, but a right always inherent in the crown, and cannot paſs without expreſs words, and that by grant under the great ſeal only.

1756. The right honourable Charles Erſkine of Alva, lord chief juſtice clerk in Scotland, iſſued his warrant to arreſt the lieutenant of a man of war lying in Leith roads, for an aſſault and battery committed on ſhore. The offender being on board ſhip, it was thought could not be apprehended by virtue of this warrant; the judge of the admiralty there iſſued another. The captain of the ſhip obſtructed its execution. The admiralty there was deemed to be authoriſed to attach the captain; and it was held, that being in his majeſty's ſervice was no exemption from arreſts either in civil or criminal ſuits.

1756. Commiſſioners of the admiralty who ſign orders to an admiral, and ſtill continue at that board, cannot ſit on his court martial. Admiral Byng's caſe.

1757. A priſoner of war had committed a horrid crime upon another. It was held to be a matter of diſcretion, whether the lords of admiralty would order the offender to be proſecuted or not, he not being an Engliſh ſailor, nor the offence committed on board an Engliſh ſhip. If they declined it, application to be made by the commiſſioners of ſick and wounded ſeamen to the civil magiſtrate.

1758. The commiſſioners of oyer and terminer of the admiralty of England, can take no notice of informations made and examinations taken by the commiſſioners of marine of Rotterdam, or other place abroad, nor is this ſufficient foundation for granting their warrant for ſearching ſuſpected places, or apprehending ſuſpected perſons.

1759. A French ſhip taken, on board which an offici-

letter was found revoking its commiſſion as a letter of marque, the crew not to be treated as pirates, but as priſoners of war; for no commiſſion is neceſſary to juſtify the ſubjects of France, after a declaration of hoſtilities, in warring upon England, though the want of ſuch commiſſion may make them liable to penalties in their own country.

1760. The merchants of Dublin applied to the lords of the admiralty to direct the commanders of his majeſty's ſhips not to moleſt Iriſh ſhips laden with French wines and brandies, from the ports of France to Ireland. The lords could not give any ſuch directions, it being the duty of his majeſty's ſhips to make ſuch ſeizures, the legality of which, if at all, could only be queſtioned by due courſe of law.

1761. Perſons charged with piracy on board a privateer, held to be triable by a court martial; but if they can be handed over to the admiralty ſeſſions, or are already in poſſeſſion of the civil power on ſhore, there ſeems no occaſion to have recourſe to this juriſdiction.

1762. An Engliſh ſhip belonging to private owners, and hired by French officers releaſed by his majeſty's order, may legally ſail to a port in France, after preliminaries and before definitive treaty ſigned.

1768. The maſters of merchant ſhips refuſed to pay to ſeamen entering from them on board his majeſty's ſhips more than a moiety of their wages, *while abroad.* The ſeamen were *immediately* entitled to their whole wages, the acts of parliament regulating the payment of wages not applying to this caſe.

1770. On a diſpute at Portſmouth, between the vice-admiral's coroner and the coroner of the county, it was held that the judge of the admiralty and the vice-admirals have, by patent, cognizance of the deaths of perſons in the ſea, public ſtreams, ports, &c. that they may depute by their patents deputies to execute any act they may do themſelves. That their coroner on the high ſeas would have excluſive

juriſdiction, and in port and beneath the bridges, at leaſt, a concurrent juriſdiction with the coroner of the county.

1777. Naval courts martial cannot ſummon witneſſes who are not of his majeſty's navy.

1778. A letter of marque having iſſued eight days before a prize was taken, though the captain had it not in his poſſeſſion, nor knew of it, it was good prize, and not a droit of admiralty.

1777. Certain ſailors had by a riſing on board a tranſport taken by an enemies privateer, reſcued the tranſport, and carried her into Ireland; they demanded *ſalvage*. The caſe was not within the letter of the ſtatute, in as much as the recaptors were not commiſſioned, and the retaken ſhip and cargo did not belong to a ſubject, but to the crown. Here then the court might, and I believe did not take the ſtatute for their guide in allowing an eighth, but on account of particular merit allowed more. Caſe of the Molly tranſport.

1778. A French ſhip l'Amiable Marie, was in the month of April taken and carried into Jerſey, by a non-commiſſioned veſſel as againſt France, as if her cargo had been American, though it really was French. The captors afterwards agreed to reſtore her; but then ſhe was re-ſeized on the part of the king, at the inſtance of the king's proctor, and claimed alſo by the proctor of the admiralty. Since this French ſhip was not brought into port by revolt, nor driven in by a commiſſioned ſhip, (which are the words of the order of council 1665), they were held droits of admiralty, and not perquiſites of the treaſury or exchequer.

1778. All the ſhips taken from France by veſſels having letters of marque only againſt the Americans, became droits of admiralty.

1781. *Staves* ruled not to be a naval ſtore, though in ever ſo great a quantity, unleſs it were ſhewn that the French at Breſt were in ſome peculiar want of caſks. In

the year 1778, it had been held that *lead* is merchandize of promiſcuous uſe, and if found to be ſhipped in large quantities for the ports of an enemy, may be at leaſt ſtopped and ſold in England; and the ſame is true even of thoſe goods which are enumerated as not contraband in our treaties with neutral nations, if of promiſcuous uſe, and deſtined for the ports of an enemy in great want of ſuch merchandize.

1781. The caſe of the recapture of king's ſhips having been omitted in the ſtatutes giving ſalvage; but ſalvage held to be due on ſuch recapture to be regulated at the diſcretion of the court.

1783. A ſhip unjuſtly detained as prize is entitled to demurrage, and the offer of demurrage in writing, together with his papers, ſhould be offered him in preſence of a notary.

1779. An enemy's ſhip captured by a king's tender is a droit of admiralty, and not prize to the tender.

1780. The captain of a fleet is entitled, under the order of council of 1747, to be conſidered as a flag officer, and to a ſhare in the diſtribution of prizes accordingly. Caſe of Captain Kempenfelt.

Preſt men are not ſubject to the articles of war, until actually rated on board ſome of his majeſty's ſhips.

1782. The judge of the admiralty of Ireland, *then* a vice admiralty court, held removeable at pleaſure, without proof of malverſation, ſo of Minorca 1780.

1786. The Eaſt India company, under their charter of the 31ſt of George II. entitled to ſuch prizes only as are either within their limits, or taken by their ſhips during wars commenced by them or on their account.

1785. A ſentence being ſilent as to the time and manner in which a priſoner was to ſuffer, the lords of the admiralty held to have a right to iſſue their warrant, and direct the time and manner, without any ſpecial warrant from the king for that purpoſe.

1785. An offence having been committed on the high ſeas, and the proſecutor poor, under age, and without friends, the lords of the admiralty were willing to pay the expence of the proſecution.

1791. Sailors from a frigate, put on ſhore at Meſſina to perform quarantine, ſtole goods from the Lazaretto. This is robbery within the meaning of the 30th article of war, and they triable by a court martial under the authority of the 35th.—N. B. This was made a queſtion of much doubt on the words of theſe articles, and of the 36th.

A natural born ſubject of England reſiding at Rotterdam, though as to his allegiance he ſtill continues a ſubject of England; yet in all matters relating to trade muſt be conſidered as a foreigner, and is not entitled to a Mediterranean paſs.

The commiſſioners of the admiralty have a power of granting warrants to commit any perſon for piracy, on regular information upon oath; but cannot empower perſons to ſearch privateers, or other ſhips, for goods ſuſpected to be piratically taken.

1776. An American veſſel, with an Engliſh paſs, and the maſter an Engliſhman, was freighted at Leghorn by Tuſcan ſubjects to go to Alexandria. The captain changed his courſe, and put the Tuſcan ſupercargo and others on ſhore on the coaſt of Africa, near Oran, and from thence to Alicant. The proprietors of the cargo applied to the Britiſh conſul at Leghorn; in the mean time certain honeſt ſailors, diſapproving of the maſter's fraudulent conduct, which was piracy by the ſtatute of William III. after he had ſold part of the cargo, ſeized the ſhip while he was on ſhore, and brought her into Cadiz. The owners of the cargo conceiving ſhe was become a droit of admiralty, applied through the conſuls, Sir John Dick and Mr. Udney, in England, for compenſation out of her. If ſhe had even belonged to the captain, which did not appear, ſhe was not

forfeited to the king, unleſs he was convicted. The owners of the cargo were adviſed to obtain his majeſty's order to his majeſty's conſul to deliver up the ſhip to them, or to conſent to any ſummary mode of proceeding, in the maritime court of that local juriſdiction where the veſſel was.

1799. The ſhip of a neutral power, (the Ottomans) had been unjuſtly detained, and obliged to put into Malta. She was afterwards delivered up to the neutral, and by him accepted by the interference of the conſul. The owners were adviſed, it being not a common caſe, to move the court *eſpecially* on affidavits for a monition againſt the unjuſt captors, to ſhew cauſe why they ſhould not be decreed to pay coſts and damages.

The caſe of the capture of Jaggernaikporam, in the Eaſt Indies, in the year 1780, was a curious caſe of joint capture, by land and naval forces in the India company's ſervice. The Eaſt India company were, in the firſt inſtance, entitled by their charter, to all the effects there taken; but there having been an appeal in this caſe, of the reſult of which the author has not been informed, he is not able to give the ultimate deciſion.

The famous caſes of the Hookſkarpel and Oeſter Eems, are in fact given by Mr. Robinſon in his notes.

Cinque Ports. A large Dutch ſhip found at ſea, with no perſon on board, nor papers to diſcover to whom ſhe belonged, and carried into Dover, was held, in 1763, to be a droit of admiralty; but that the lords of the admiralty might, if they thought fit, direct proceedings againſt her in the port of the Cinque Ports. Enemy's ſhip ſtranded on Goodwin Sands, cargo landed at Deal, Cinque Ports have not juriſdiction, and though landed, a droit of admiralty.

In the caſe of the King of Pruſſia privateer, 1759, whoſe crew violently aſſaulted perſons who came on board to ſeize certain ſailors accuſed of piracy, the offence was deemed

cognizable by the admiralty ſeſſions, though it happened in the port of Dover.

In 1751, a robbery having been committed on board the Savage ſloop, in Dover harbour, it had been deemed to be within the juriſdiction of the Cinque Ports, excluſive of the admiralty of England.

Courts-Martial. The firſt captain to the commander-in-chief, has a right to rank next to the junior rear-admiral, as member of a court-martial.

Sir Hyde Parker's Caſe, 1791.

Whether a lieutenant acting as maſter and commander, under 22 Geo. II. ch. 33. can ſit as member of a court-martial, greatly doubted, and adviſed that the opinion of the judges ſhould be taken.

Lieut. Peyton, 1789.

No. 5.

ADMIRALTY CASES DECIDED IN IRELAND*.

Coriſh *v.* the Murphy.

PROMOVENT alleged, that having advanced 99l. 4s. to impugnant, who was the owner of one half of the veſſel in this cauſe, *for the purchaſe of ſaid moiety of ſaid veſſel, and for other purpoſes reſpecting the ſame, the ſaid* impugnant executed a bottomry bond to him upon the body or hull of ſaid veſſel, then lying in the port of Briſtol; and to undertake a voyage from thence to Milford, and from Milford to Wexford, dated 11th February, 1795, upon the high ſeas and within the juriſdiction of the court, for repayment of ſaid ſum, and that it ſtill remained due.

* Theſe caſes are more particularly inſerted, as ſhewing the native powers of the admiralty prohibitions having there been leſs frequent.

To this allegation or petition, which followed the words of the bond preciſely, impugnant put in an exception, becauſe it was not alleged that the money ſo advanced was for the repairs or uſe of the ſhip (the words *other purpoſes* being too vague and general), or that the repayment thereof was to depend upon any riſk to be run by ſaid veſſel in her intended voyage, *or that ſuch repayment was to be made or depend on the event of the* ſafe *return thereof*, ſo that it did no where appear by the allegation, whether ſaid bond were *in law a bottomry bond*, ſo as to give the court juriſdiction.

I argued, that there were two kinds of bottomry bonds deſcribed by Sir W. Blackſtone, one truly ſo—the other vulgarly ſo called, but only ſuable in a court of law.

That this was a bond merely depending upon the *riſk* and not pledging the veſſel, that no words were found in it, which could be conſtrued to pledge the veſſel. That to pledge the veſſel, ſuch expreſs words as the following muſt be uſed: I, A.B. do bind the ſaid ſhip, with the freight, tackle, and apparel of the ſame, as in the precedent, in Beawes, Vol. I. p. 139.—that even ſuppoſing the veſſel pledged, and that it was properly a bottomry bond, yet it did not follow that the admiralty had juriſdiction—that every hypothecation of a ſhip does not give the admiralty juriſdiction, for if the maſter hypothecate under ſeal before the voyage begins, it was admitted in *Menetone* and *Gibbons*, 3 Term Reports, that the admiralty had not juriſdiction—ſo if he hypothecate, but not for neceſſaries for the ſhip—that if a contract be made even upon the ſea, if not for a marine cauſe, it cannot be ſued in the court of admiralty. Hobart 12. Bridgeman's Caſe. Bacon, Court of Admiralty. C.

That it muſt be a marine contract, and for a maritime cauſe; it doth not appear here to be either: inſtances of bottomry bonds ſued at law are frequent. Lev. 54. Siderfin, 27. 2 Ch. Caſ. 130. Ab. Eq. Ca. 372.

Action of debt on a bond for monies taken up on bottomry mentioned. Molloy, lib. 2. ch. 10. p. 129. Cro. Ja. 208. Sharpley *v.* —— and ſee 1 Atkyns 341.

Dandy *v.* Turner, was a caſe of a part owner borrowing money on a bottomry bond, payable on the return of the ſhip from the voyage.

A ſheriff may take a ſhip in execution like any other chattel—why not? And if part of a contract is triable at common law, and part by the admiral law, the common ſhall be preferred, Hob. 212.

On the other ſide were quoted Johnſon *v.* Shippen, 2 Raymond, 982. 2 Bla. 459. Molloy, lib. 2. Ch. II. ſ. 12. and for forms of bottomry bonds, 2 Newman, 480, 481; and it was urged that it is not the *form* of a bottomry bond which varies the juriſdiction, but the *ſubject matter.*

The court was of opinion that the veſſel was hypothecated, for the party run the riſk on the hull of the ſhip, and it would have been unneceſſary to mention the hull or body of the ſhip otherwiſe. That the mere form of the bottomry bond did not ſignify, if the meaning of the parties was clear; and that this was not an unuſual form, there being in Wood's Complete Conveyancer, under title *Bond*, a precedent very like to it—that where it did not appear where it was executed, the court would not preſume againſt its own juriſdiction, eſpecially as if it did, the parties could not have the ſame remedy in courts of law, the ſentence of this court going *in rem.*

Pillans *v.* the Victoria.

This veſſel, captured in 1779 by the Shillelagh privateer, Captain Pillans, and brought into Dublin, was condemned as prize by the court of admiralty in Ireland. The lords commiſſioners of appeal in England, in the year 1781 (the Iriſh being then only a vice-admiralty court), reverſed the ſentence, on the ground that at the time of the capture,

hoſtilities had not commenced between Great Britain and Spain; and ordered the ſhip and cargo to be reſtored to certain claimants in London, and gave coſts but no damages. In 1788 * their lordſhips were applied to, with a complaint that reſtitution was not fully made. It was decided that the captors were anſwerable for any deficiency in the ſhip, if it had been plundered, but for warehouſe-room of the cargo, and ſuch things, captors were not anſwerable, no damages having been given. Sale of the ſhip, though decreed below, not having been made, marſhal of the court was not entitled to any commiſſion.

Parry and others *v.* the Peggy, Captain Gibſon.

The promovents had agreed for monthly wages, for a voyage to the Weſt Indies. They worked on board the ſhip for ſome days in the harbour of Dublin; afterwards Mr. Maguire, the owner of the ſhip, having changed his mind, determined to alter the voyage, and to poſtpone the ſailing of the ſhip, whereupon the ſeamen were diſmiſſed without their wages, who now libelled againſt the ſhip. As ſurrogate of the admiralty, I decreed for the ſeamen on the reaſon of the thing, and the authority of Wells *v.* Oſmond, 2 Shower, p. 238.

Murphy *v.* the James.

Mariners had engaged by the run from Liverpool to Dublin. Moſt ſevere ſtorms, in February 1799, drove the veſſel inevitably into Milford-haven, where ſhe was *neceſſarily* detained by the weather ſixteen days. Mariners who engage by the run are not entitled to any extra wages on account of any ſuch accidents, unleſs it be by ſome ſubſequent agreement. Their run money is conſiderably greater than it otherwiſe would be, becauſe they take their chance of all ſuch accidents.

* It is therefore that I inſert the caſe, though the queſtion of prize was determined ſo long before.

Mitchell and others *v.* the Favourite Nanny.

This was a ſuit for ſeamen's wages. William Grunderſon took defence, and pleaded that he was maſter and owner of ſaid veſſel; and that he had on the 8th of February, 1793, agreed with the regulating captain in the port of Dublin, who acted on the part of the judges of the admiralty, that ſhe ſhould be taken into the ſervice of his majeſty as a tender—that ſhe was ſo accordingly, and put under the command of a lieutenant of the navy; and that the promovents knowing the premiſes entered with the ſaid lieutenant, and that therefore their wages were only demandable at the navy-office of *England*, and ſuable and recoverable *only* in the high court of admiralty of *England*, and not in this kingdom, nor againſt the ſaid Grunderſon.

To this we replied, that ſuppoſing, but not admitting, the law to be as mentioned in the exception, that it was irrelative, becauſe they entered with Grunderſon the maſter of the ſhip before ſhe was hired for a tender, *abſque hoc* that they entered with the ſaid lieutenant. This fact being proved, the point of law was not decided.

—— *v* the Jenny of Pengelly.

The promovent alleged, that he being a merchant of Waterford, had laden certain flour on board this veſſel, which, as appeared by the bills of lading ſigned by him and Robert Davies, the maſter of the ſhip, the ſaid maſter contracted ſafely to deliver in Dublin; and that the ſaid maſter had been guilty of a breach of contract, the flour being embezzled, or not delivered.

The impugnant put in a declinatory exception inſtead of an anſwer, in which he ſaid that the contract was entered into within the body of a county within this realm, to wit, at the city of Waterford in the county of the ſaid city; and that the ſaid bills of lading were ſigned, and the ſaid

ſhip was then lying, and the ſaid flour delivered in the county of the ſaid city of Waterford, and not upon the high ſeas, nor within the juriſdiction of the court of admiralty; and therefore he prayed right and juſtice, and that the court would not take cognizance of the matter, and that his exception ſhould be decreed valid with coſts.

For the promovent it was inſiſted, that by the famous articles, 1632 (ſee Cro. Ch. 296. 3 edit.), it was ſettled that ſuits might be brought in the admiralty for the breach of charter-party, provided their exiſtence was not diſputed (which is the caſe here), and provided the penalty, if any, was not ſued for, and that a bill of lading differs from a charter-party only in this, that the firſt is required and given for a ſingle article or more laden on board a ſhip that has ſundry merchandize ſhipped for ſundry accounts, whereas a charter-party is a contract for the uſe and freighting of the whole ſhip—but the ſame reaſon extends to both. And that the old and abſurd notion of *locality* ſuperſeding the *nature* of the contract, was long ſince exploded.

The admiralty in this caſe decreed for its juriſdiction, and no prohibition was applied for. See Roll. Ab. 530. l. 40.

Wood *v.* the Hannah.

1799.

This brig, bound from Maryport to Dantzic, was captured by a French privateer on the coaſt of Norway, and carried into Chriſtian-ſound in that kingdom, which is a neutral port; condemned as prize by a court of admiralty there, and ſold to a neutral ſubject; ſhe was afterwards repaired, ſo as almoſt to become a new veſſel, and got a new regiſtry, and was ſent by her new proprietor with a cargo to the port of Belfaſt in Ireland, where Wood, of Maryport, her former owner, ſeized her under a warrant of the Iriſh court of admiralty, alleging that the condemnation

and ſale of the ſaid brigantine or veſſel at Chriſtian-ſound was an illegal condemnation, and that the property was not thereby legally changed.

There was ſome queſtion about the facts, as to the diſtance of the veſſel from the coaſt of Norway when taken —more about the law, viz. as to the old queſtion, when a ſhip is ſaid to be truly brought *infra præſidia hoſtium*, and the true interpretation of theſe terms, and alſo as to condemnations by neutral powers. (See the caſe of Goſs *v.* Withers, 2 Burr. 683.) but the arguments and authorities cannot be here adduced, becauſe,

Adhuc ſub judice lis.

Archer and others *v.* the Ann of Dundalk.

29th May, 1796.

Promovents filed their libel in the court of admiralty, ſtating that on the 8th of February preceding, they being in the harbour of Ardglaſs, in the county of Down, on board a boat or ſmack called the Eſther, of which they were the crew, obſerved the hull or body of a ſhip, at a conſiderable diſtance out at ſea, drifting towards the north-eaſt. That they ſailed towards the ſhip, came up with her twelve miles diſtant from the ſhore, and found her to be the Ann of Dundalk, abandoned by her crew, and not a living creature on board. That they did every thing they could to protect the veſſel, which however had been previouſly plundered, and brought her to Skerries on the 9th of February. That when brought into the harbour of Skerries ſhe was worth 300l.—that her cargo was worth 600l. and actually ſold for 420l. And they prayed to be decreed to the veſſel and cargo, or ſuch proportion thereof as the court ſhould pleaſe. The admiralty was proceeding in this ſuit, when ſtopped by the conſignors of the cargo of the veſſel moving for the following prohibition.

K. B. Motion for a prohibition to the admiralty.

Glaſcot *v.* Archer.

Eaſter, 1796.

Plaintiff, to whom the cargo of the ſaid ſhip Ann was conſigned, filed a ſuggeſtion, ſtating that by the laws of this realm, the rewards which ought to be given for ſaving ſhips in danger of being wrecked, in proportion to the merits of the ſalvagers, are to be adjuſted by two or more neighbouring juſtices, and are not cognizable by the court of admiralty *.

That the ſhip Ann of Dundalk, being in danger of being wrecked, was ſaved by the crew of a wherry belonging to Skerries, aſſiſted by the defendants in prohibition, who were the crew of another veſſel called the Eſther ſmack. That they had given the crew of the ſaid wherry a recompence, and had alſo ſettled with one Mr. Mulholland, who ſaid he was authoriſed by defendants in prohibition to ſettle for them, and had paid him 25l. accordingly.

Defendants made affidavit in anſwer, ſwearing that they never had ſo authoriſed Mulholland, and never had received any recompence—that the cargo was inſured to a great amount, and the inſurance ſince paid to plaintiff Glaſcot, and that ſaid now plaintiff had, by giving bail in the admiralty, ſubmitted to its juriſdiction.

For the plaintiff in prohibition it was ſaid, that though before the ſalvage acts the admiralty had juriſdiction, that was now taken away. That though courts of common law could not be ouſted but by expreſs words, yet it does not appear to be ſo in other courts, nor neceſſary to exclude *inferior* juriſdictions. That theſe ſtatutes ſpeak of ſhips in *danger* of being ſtranded or run on ſhore, which was the caſe here, and alſo of holding out falſe lights, and therefore muſt relate not merely to ſhips wrecked upon the ſhore, but muſt extend to a conſiderable diſtance therefrom. That

* The principal ſalvage acts in Ireland are 4 Geo. I. 11, 17; and 32 Geo. II. 15, 16; 23 and 24 Geo. III.

they ſpeak of plundering a ſhip in diſtreſs, therefore every ſhip in diſtreſs is by them within the juriſdiction of the law courts—and talk of cauſing a ſhip to be carried into port, muſt mean therefore a ſhip upon the high ſeas. A port or haven is within the body of the county, 4 Inſt. 138. ſo is any place above low water-mark, 4 Inſt. 139. ſo is any coaſt, ſhore, or harbour, Mo. 892.

On the other ſide it was inſiſted, that though wreck was not within the juriſdiction of the admiralty, flotſam and derelict at ſea certainly was. That admitting that expreſs words were not neceſſary to ouſt an inferior juriſdiction, the argument did not apply, as this was a high and ancient court, and that the parties had allowed the juriſdiction of the court.

Caſes cited were 2d Brownlow, 30. Dike *v.* Brown. 2 Lord Raymond, 835. Sir Lionel Jenkyns, Vol. I. p. 81. Beawes Lex Mercat. tit. Salvage. 1 Siderfin, 178. and numerous quotations as uſual were made from 4th Inſtit. The matter was compromiſed by the advice of the court.

Caſe of the Fly Sloop.

Three merchants of Belfaſt entered into a charter-party for the Fly ſloop. They freight her from Belfaſt to Malaga; ſhe returned loaded with wine. The captain, without their knowledge, took wine on board in illegal caſks, and alſo ſmuggled; and the ſhip proving in diſtreſs, and having no coaſt cocket or licence on board, was ſeized.

The commiſſioners of appeal diſcharged the ſhip, condemned all the wine.

The ſhip had been inſured, among other things, againſt the barretry or fraud of the captain or crew, as is uſual. A quere was made.—Could the freighters recover againſt the inſurers, and they again in their return in the aſfreighter's name againſt the captain or owner, and if ſo,

what proceedings, whether by attachment from the admiralty, writ of juſtices, or otherwiſe, and at whoſe ſuit, to attach the ſhip to anſwer either an action of damages or bill of coſts?

It was the opinion of council, that the affreighters might well ſupport an action of covenant againſt the maſter of the veſſel on the charter-party, for the ſum of 500l. which was the penalty mentioned in the charter-party, or a ſpecial action on the caſe againſt him for their whole damages; but as it was ſtated that the maſter was worth nothing, they thought it would be moſt adviſable to come upon the veſſel, and for that purpoſe inſtitute a ſuit in the admiralty court againſt her on the charter-party, not praying that the veſſel ſhould be ſold for the 500l. the penalty in the charter-party, but for their damages in general; and in ſuch ſuit they might procure a warrant of the admiralty court to arreſt the ſhip. This was thought their only poſſible remedy, though not without riſk of a prohibition if applied for. The advice was followed and ſucceeded.

Briggs *v.* the Perſeverance, George Tetherly Maſter.

Two brigs, the Ann of Whitehaven, Joſeph Briggs, maſter and part owner, and the Perſeverance, of Appledore, Tetherly, maſter, encountered each other in the Iriſh Channel, on the 30th of May, 1795, in a very thick fog, and by the colliſion the brig Ann was ſunk, which was the origin and foundation of the preſent ſuit. The ſtroke was between and upon the larboard bows of each veſſel.

It was agreed that the Perſeverance was ſteering her courſe N.N.E. and the Ann her's S.S.W. with her ſtarboard tacks on board; and with reſpect to the wind the parties differed only as far as one point, the Ann's crew inſiſting it was S.W. the Perſeverance that it was S.W. by W.; it was not controverted that the wind was rather freſh; the Perſeverance then going at the rate of ſeven

knots an hour, the Ann at the rate of five—and that the Perſeverance was going nearly before the wind, or *going large*, and that the Ann was in the poſition called by ſeamen *cloſe hauled*.

Briggs admitted that the fog was ſo thick, that his crew could not ſee the Perſeverance until within 100 yards, but inſiſted that he was ſailing into the fog, and the Perſeverance out, and brought evidence to prove that ſome of the Perſeverance's crew had declared they ſaw the Ann ten minutes before the ſtroke; which was oppoſed by counter evidence, that went alſo to prove that the fog was equally thick all around.

It was proved beyond controverſy and not diſputed, that of nine perſons, which was the number on board each veſſel, every one was upon deck in the Perſeverance at the time of the ſtroke, and ſome looking out forward—whereas on board the Ann the captain was in bed, and of the ordinary watch one was abſent; and of the other three, one was at the helm, and the remaining two intent upon ſplicing a rope and ſtanding on the quarter-deck. The party of the Perſeverance, therefore, accuſed the Ann of ſuch groſs negligence in not keeping a look-out, as made them anſwerable for all the conſequences.

Another grand queſtion aroſe, as to what was the duty of each ſhip, after its crew ſaw the other. It was admitted that the rule of the marine law is, that the ſhip going *large* or before the wind, ſhould give way to the ſhip going *cloſe hauled*, or acroſs the wind.

This rule the crew of the Perſeverance inſiſted they obeyed by going to *leeward*. The Ann's captain inſiſted they ought to have gone *aſtern*. They anſwered they *did* in the true meaning of the term, and if any thing elſe was meant, it muſt be that they ought to have gone to *windward*, contrary to the univerſal rule.

It was inſiſted alſo by the Perſeverance's crew, that they did their duty, in putting her helm *a port* or *hard a weather*,

and in lowering their mainſail—that the helm of the Ann ought to have been put *a lee* (about which fact there was a contrariety of evidence), and her foreſheet let go, and jib hauled down, which if there had been a man forward might have been done in an inſtant, and would inevitably have prevented the colliſion; that theſe laſt ſteps were not taken Briggs did not deny, but ſaid it would have been impoſſible in the time.

In a caſe fit only for a jury of ſeamen (and which the impugnant earneſtly urged the promovent to have tried by a jury in London, where caſes of that kind frequently occurred, and the aſſiſtance of a maſter of the Trinity-houſe was often afforded to the judge at niſi prius), the judge of the admiralty obtained the aſſiſtance of the ſenior captain of the Britiſh navy, Sir A. Schomberg, who is reſident in Dublin, as his aſſeſſor; and the parties added to the council, two gentlemen very reſpectable in the profeſſion, and who had been in earlier life officers in the navy, Mr. O'Dwyer and Mr. Barnes. The aſſeſſor, high in character as a man and as a ſeaman, was at firſt inclined to impugnants, but ultimately thought them wrong. The judge (though, as he ſaid, not for the reaſons given by his ſkilful aſſeſſor), decreed for the promovents, and the decree was affirmed on appeal to delegates by three common law judges, but without ſpecifically giving their reaſons.

Briggs *v.* Sir Anneſly Stewart and Richard Williams.

The defendants, who were bail for the Perſeverance in the caſe preceding, conceiving the deciſion a hard one, thought themſelves entitled to take any legal advantage. In the ſtipulation they were bail for the brig Perſeverance of *Appledore*, *John Tetherly* maſter.

The ſuit was erroneouſly inſtituted againſt the Perſeverance of *Swanſea*, *George Tetherly* maſter, and the promovents, though informed of the miſtakes, perſiſted in it, in order, as was ſaid, to deprive impugnants of George Tetherly's evidence, which would have been very important.

This was ſworn by impugnants on an application made early in the cauſe to the court of admiralty, to amend and alter theſe names, which that court refuſed, becauſe George Tetherly had been regiſtered as nominal captain to avoid impreſſing; the conſequence was, the decree and monition in purſuance of it could not correſpond with the ſtipulation entered into by the preſent defendants.

June 28. A rule on the bail to bring forth the veſſel. July 5. Monition to the bail to pay debt and coſts.

The bail paid no attention to theſe rules, conceiving that they were irregular, inaſmuch as execution ſhould have been againſt the veſſel; and then if ſhe could not be found, a rule on the bail unleſs cauſe, juſt as at law a *ſcire facias* doth not go againſt bail, until a *capias* againſt the principal be returned.

The bail, however, an order having been made to attach them, appeared on October 21, and moved to ſet aſide the proceedings for the reaſon above, and alſo becauſe the monition was againſt the brig Perſeverance of *Appledore*, *George Tetherly* maſter, and therefore not conformable to the ſtipulation, which was for the brig Perſeverance of *Swanſea*, *John Tetherly* maſter. *Rule.* Proceedings ſet aſide with coſts againſt the bail, and a new monition to iſſue conformable to the ſtipulation.

November 6. Commiſſion of appraiſement and ſale to go againſt the veſſel, and ſo much of the rule of the 21ſt of October, as related to the bail paying coſts reſcinded. November 11. The veſſel not being to be found, the commiſſion of appraiſement and ſale vacated. December 18. Ordered that the taxed coſts, in the court of delegates, be added to the monition, although we inſiſted that the bail never bound themſelves to pay the coſts of the appeal, but there ſhould have been new bail as on writs of error in the law courts. See Clark's Prax. Ad. 5th edition, note to p. 16.

1798. February. A monition having iſſued conformable

to the ſtipulation, Dr. Browne moved the court to ſet aſide all the proceedings againſt the bail, as the monition (though now conformable to the ſtipulation) was not agreeable to or founded upon any ſentence or cauſe exiſting in the court, nor were the bail bound for the veſſel againſt which a decree had been pronounced in a cauſe entitled Joſeph Briggs againſt the Perſeverance of *Appledore*, *George Tetherly* maſter, nor ever entered into any recognizance for the production of any ſuch veſſel. The motion was refuſed, and leave given to the promovent to apply for permiſſion to amend.

The promovent accordingly on a ſubſequent day moved for leave to amend the *bail bond* by altering the word Swanſea to Appledore, and John to George; which we oppoſed on the ground, that it would be a moſt arbitrary, unlimited, and unprecedented exertion of authority to make a man bail for a ſhip or a perſon whom he never proffered to be bail for. That if any amendment were to have been made, it ſhould have been when we applied in the beginning of the cauſe, in which caſe we ſhould have had the benefit of George Tetherly's evidence; but to ſay that he ſhall be conſidered as the maſter while the cauſe continued, ſo as to deprive us of his evidence, and that the ſtipulation ſhould now be altered in order to get at the bail, would be a double injuſtice. That, however our defence might be *inter apices Juris*, it was one that courts of common law had never preſumed to diſpiſe or to decide againſt. See 3 Lev. 235.—Mod. Ca. 309.—1 Salk. 102.—Moore, 694. 407.—1 Mod. 5.—2 Jon. 188.—Cro. Eliz. 223 and 458. and the ſayings of Lord Kenyon in Owen *v.* Nail. 6 Term Reports, p. 705. where he ſays, "although we hear objections of this kind "with ſome prejudice, yet we muſt take care, in our earneſt "deſire to do juſtice, not to tranſgreſs the limits of the "law."

The court gave leave to amend the ſtipulation, but an appeal has been brought.

Boulger and others *v.* Ship Anne.

The promovents *mariners* ſtated, that the ſaid ſhip of whoſe crew they had been, was wrecked on the 5th of October, 1795, on the coaſt of Norway; that Scallan the captain had received a large ſum of money, the produce of the ſale of the wreck, and that ſeamen's wages were the firſt money that ought to be paid thereout. Scallan applied to the court of king's bench for a prohibition, after ſentence had paſſed againſt him in the admiralty, on four grounds, 1ſt, that it was a contract made on land; 2dly, though beyond ſeas, yet for payment of money at home, and the contract to be completed at home; 3dly, that at the time of iſſuing the warrant, the ſaid Scallan was not maſter of any ſhip; 4thly, that the contract was ſpecial, and alſo under ſeal.

The three firſt points had no weight; the laſt, if it had appeared *upon the face of the proceedings*, would, as it ſeemed, in the opinion of the court on the authority of Howe *v.* Napier, 4 Burr. 1944*, have been ſufficient to obtain prohibition, but *after ſentence*, nothing will avail which doth not appear on the proceedings. The party here even acknowledged it was a matter *dehors* the proceedings, by ſupporting his ſuggeſtion by an affidavit, which, if it appeared upon them, would not have been neceſſary. Prohibition refuſed.

Lalor in Prohibition, K. B.

In the laſt caſe, the court of admiralty had attached Lalor for reſcuing Scallan, who had been arreſted by an admiralty warrant. Lalor applied for a prohibition, inſiſting

* With great ſubmiſſion however the caſe of Howe *v.* Napier as far as relates to contracts under ſeal ouſting the juriſdiction is contradictory to Lord Holt in his Reports, p. 50. and is contradicted by Menetone and Gibbons, 3 Term Reports, but in truth the caſe of Howe *v.* Napier went on the conjoint circumſtance of its being *under ſeal*, and alſo *ſpecial*, and perhaps in reality upon the *latter* only.

that the court of admiralty has not juriſdiction or power to attach for contempts, unleſs committed in its ſight and view. His council cited Vaughan, p. 1.

I argued that no court can ſupport itſelf without a power of puniſhing contempts, and that it was an abſurd diſtinction to ſay the court could attach for aſſaulting an officer of the court in its preſence, but not if he was aſſaulted a yard from the door. To look therefore for authorities ſeemed ſuperfluous, for to uſe the words of Judge Blackſtone, laws without a competent authority to ſupport their juriſdiction would be vain and nugatory; therefore the proceſs of attachment muſt be as ancient as the courts themſelves, 4 Black. Comm. p. 285. ch. 20.

It is objected it cannot attach in the preſent caſe, becauſe it is not a court of record. That cannot be the principle, for ſo neither could it attach for contempts in its preſence. The court of chancery is not a court of record, yet attachments were borrowed from it; until ſequeſtrations were invented, its whole proceſs was in nature of proceſs of contempt.

It is ſaid a juſtice of peace cannot fine but for contempts *in his preſence*. To compare that office with this high court of ancient juriſdiction is not a fair analogy. But what can the juſtice do?—He can, immediately upon information given to him of a reſcue, iſſue his warrant, and have the man taken up. The eccleſiaſtical court can excommunicate, but this court would be helpleſs; for ſurely it will not be ſaid, that this high court is every moment to apply for aid to a juſtice of peace or a court of law, or elſe to deſert its officer, and leave him if abuſed merely to his action?

I admit the caſe in Vaughan, p. 1. ſays, this court may attach for contempts *in its preſence*, and theſe words have been, perhaps carcleſsly, copied by Judge Blackſtone in his Commentaries; but there are no *excluſive* words ſuperadded.

—It is no where ſaid *directly* that the court ſhall not attach for contempts committed at a diſtance, and I think 12 Mod. 246. and 1 Lord Raymond, 446. Rigden *v.* Hedges, ſhew that it can.

I take the true and only diſtinction to be, that if the contempt be committed in the face of the court, the offender may be inſtantly puniſhed without further examination; but in matters that ariſe at a diſtance, there muſt be a rule to ſhew cauſe*; and Sir W. Blackſtone admits this is the diſtinction in the law courts, 4 Black. ch. 20. p. 285.

Although it be not a court of record, it may by cuſtom of the court amerce the defendant at its diſcretion, 13 Rep. p. 53. and this is a warrant, not properly an attachment. As to arreſting the perſon here, ſee 1 Roll. Ab. 53. Godbolt, 193. 3 Black. ch. 7. p. 109.

Other caſes cited were, 1 Lev. 253. 1 Salk. 136. 1 Term Rep. 555. 3 Black. Comm. 113. 2 Sellon's Practice.—Horan *v.* Blacquiere. Palmer, 422. Noy, 77 and 27. Watkin's caſe, Latch, 114.

The court of king's bench granted the prohibition, but without ſpecially aſſigning their reaſons.

Harriſon *v.* the George.

The promovent ſtated by his libel, that on the 20th of September, 1796, he had been engaged by Joſeph Toole, the maſter of the George, to go as mate of ſaid veſſel a voyage from Liverpool to Oporto, and from thence to Dublin, at the monthly wages of 5l. 2s. $4\frac{5}{9}$.

That on the 22d, the veſſel ſailed, and on the 29th, nine days after his hiring or engaging as aforeſaid, ſhe was captured by the Vengeur, a French privateer.

That the ſaid Joſeph Toole, in order to regain the ſaid

* The Engliſh court of admiralty, I am informed, makes an abſolute rule at once, ſo that the party muſt appear in cuſtody. Sed quære, does Clarke's Praxis Adm. agree with this?

veſſel for the owners thereof, propoſed a ranſom of 300 guineas to the maſter of ſaid privateer the Vengeur, and did accordingly ranſom the ſaid brig the George for the ſaid ſum of 300 guineas; and in purſuance of ſaid agreement a ranſom bill was executed, and promovent was delivered up by ſaid Joſeph Toole to the ſaid maſter of the ſaid privateer, as an hoſtage, until ſaid ranſom money or 300 guineas ſhould be paid, the captain of the ſaid privateer refuſing to deliver up ſaid veſſel without ſuch hoſtage; and promovent, in conſequence thereof, was carried into Dunkirk in France, where he now remains in cloſe confinement, and the ſaid brig the George was then ſuffered to proſecute her voyage.

That at the time promovent was delivered up an hoſtage as aforeſaid, the ſaid Joſeph Toole then and there *promiſed to pay promovent*, during ſuch time as petitioner ſhould be in confinement for ſaid ranſom money, and until promovent ſhould arrive at Dublin, where ſaid veſſel was bound, 10l. 4s. 9d. per month.

That the ſaid brig the George, her tackle, apparel, and furniture, at the time of the ſaid taking, was worth the ſum of 2400l. ſterling.

That from ſaid 20th day of September, the time promovent was hired, to the 29th, being nine days, at the rate of 5l. 2s. 4½. promovent earned a ſum of 1l. 10s. 9d. and from the ſaid 29th, the time promovent was delivered as an hoſtage, to the 1ſt day of March inſtant, during which time promovent has remained a priſoner for the ſaid ranſom money, is a period of five months, which at the rate of 10l. 4s. 9d. per month as agreed on by the ſaid Joſeph Toole to be paid to promovent as aforeſaid, makes a ſum of 51l. 3s. 9d. which together with the ſaid ſum of 1l. 10s. 9d. makes a ſum of 52l. 14s. 6d. Iriſh, out of which promovent, by himſelf and his wife, received a ſum of 11l. 18s. 10½. Iriſh, which leaves a balance due to promovent on the ſaid 1ſt day of March, amounting to 40l. 15s. 7½.

That ſaid brig the George performed her ſaid voyage to Oporto, and arrived ſafe in the port of Dublin, has diſcharged the cargo ſhe had taken in at Oporto aforeſaid, and has been in the harbour of Dublin theſe three months paſt, and promovent has not as *yet been ranſomed*, or his ſaid *balance of wages* paid him. Notwithſtanding promovent, by ſeveral letters written by him to Mary Harriſon, promovent's wife, which are now ready to be produced, and by a regular power of attorney executed by him, has authorized and impowered his ſaid wife to receive ſaid wages, and give receipts for the ſame.

That promovent is now reduced to the greateſt diſtreſs and poverty, and in want of the common neceſſaries of life, and his health is much impaired by his confinement, and the ſeverity of the treatment he has received thereby.

That ſaid brig or veſſel has been duly arreſted, and is now in the cuſtody of the marſhal of this honourable court, and ſo *ended his libel.*

For the impugnant, I inſiſted that if this ſuit was for wages, it could not lie, ſince the promovent admitted he was paid conſiderably more than the wages earned by him, from the time of his agreement in Liverpool to the day of the capture; and as to any ſubſequent time, he could not be entitled to any wages, ſince they were forfeited by the capture, even though the ſhip be ranſomed afterwards, 2 Lord Raymond, 1212. Wiggins *v.* Ingleton; ſo if the ſhip periſhes by tempeſt or fire, for otherwiſe the mariners would not uſe their beſt endeavours to ſave the ſhip. Molloy, lib. 2. chap 3. ſect. 10. 2 Siderfin, 179.

If a ſhip periſhes at ſea, they loſe their wages, and the owners their freight; if ſhe comes to her firſt delivering port, they have wages till then; if loſt afterwards, they loſe their ſubſequent wages.

It is ſaid, ſays Judge Buller, in Yates and Hall, 1 Term Rep. 79, that if the ſhip be ranſomed, and proceed on her

voyage, the ſailors will be entitled to their wages. No authority, ſaith he, has been cited to ſupport that poſition, and the general rule of law is, that if the ſhip be captured, the wages are loſt. The ranſom (continues that learned judge) is a new purchaſe of the ſhip, and it will require great conſideration before it is determined, that after a ranſom the owners ſhall be liable to pay wages even for the time which elapſed before the capture.

Since then this ſuit could not be ſaid to be for wages, it muſt be founded on the captain's contract with promovent. This I argued, 1ſt. was a mere perſonal contract, not pretending to bind the ſhip. 2dly. If it did affect to bind the ſhip, it was ſo far void, becauſe that ſo it would much exceed the captain's powers. 3dly. That at all events it was void, under the Iriſh act 21 and 22 Geo. III. cap. 54. ſect. 2. made in imitation of a ſimilar one in England, againſt ranſoming captured ſhips.

1ſt. The contract doth not mention the ſhip, it is not bound then by any expreſs words; the words of the libel are, *Joſeph Toole promiſed to pay promovent.* It is ſtated therefore by the party himſelf, that it was only his *perſonal* promiſe—not a word of the ſhip, or of the owners: by what violent implication then is it here made to extend to the ſhip?

2dly. Suppoſe it be conſtrued to extend to the ſhip, the maſter or captain had no ſuch power. The principle upon which the law holds the owner liable for the contract of the maſter, is, that the maſter is conſidered merely as a ſervant to the owner. Molloy, 228. Rich *v.* Coe, Cowper's Rep. 636. Now could a ſervant bind a maſter to do that which is impoſſible or illegal, as is here the ranſom; or diſadvantageous, as to pay ſo much a month, for an indefinite time, until an act be done, which act is forbidden by the law? But ſuppoſe that the promovent could ſue the owners in a court of law, on the captain's contract; how doth that entitle him to come upon their ſhip in this court? The

maſter cannot hypothecate the ſhip whenever he chuſes arbitrarily. It muſt be for the neceſſities of the ſhip while at ſea, or in a foreign port; if he borrow money for the uſe of the ſhip before the voyage commenced, it doth not give the admiralty juriſdiction.—Menetone *v.* Gibbons, 3 Term Rep. 267, if the maſter borrows money to repair the ſhip, when there is no occaſion, he alone is perſonally debtor.—Molloy, 315; every contract, even for the benefit of the owners, doth not bind the ſhip; but ſurely a contract to pay 120l. a year, probably during promovent's life, where a ſhip was actually inſured, may be to them a moſt deſtructive bargain; but above all there is expreſs authority, that the maſter cannot make the ſhip ſecurity for any perſon's redemption but his own.—Molloy, book 2. chap. 6. ſect. 13. and ſo it was by the Rhodian laws. See beſides the caſes already cited, 3 Burr. 1844. Douglaſs, 539, Abernethy *v.* Landale. 1 Ventris, 147, 12 Mod. 442, Weſt and Weſt.

3dly. I come now to the Iriſh act 21 and 22 G. III. cap. 54. ſect. 2. all contracts and agreements entered into, and bills, notes, and other ſecurities given by any maſter of a captured ſhip or veſſel, or other on board or belonging, *for* ranſom thereof, or of any merchandize, or goods on board, ſhall be abſolutely void and of no effect; how can this be evaded but by ſaying that this was not a contract for the ranſom—not made with the captor—but made with a third perſon? In conſtruing acts of parliament we are not to quibble—plain rules of conſtruction; look into the reaſon of the act. Every ſtatute ought to be expounded, not according to the letter, but according to the intent, 2 Rol. 318. Pl. Com. 350—363.—If the enacting words can take in the miſchief, they ſhall be conſtrued for that purpoſe, though the preamble does not warrant it. Baſſet and Baſſet, 3 Atk. 203. So the ground and cauſe of making a ſtatute explain the intent. Pl. Com. 173, 204.

The word *for* may mean—*Becauſe of*—Hooker.—*With reſpect or regard to*—Stillingfleet.—*For the ſake of*—Cowey.

—*In ſearch of*—Tillotſon.—*In hope of—for the ſake of*—Shakeſpere.—*In regard of*—Addiſon.—*On account of*—Aſhe's Dictionary.

The promovent's council oppoſed to this reaſoning many and ingenious arguments, to which I could not do juſtice without poſſeſſion of their notes, particularly that this was not a contract for ranſom, but collateral thereto, and not within the act of parliament; to which it was replied, that then by this kind of ſubterfuge, it was eaſy to ſee how, without any actual agreement between the captain and the enemy, the act might be eluded.

The court decreed for promovent, and gave the wages up to the day of the decree, ſo that the ſum decreed exceeded that mentioned and prayed in the libel, which the impugnant's council conceiving to be erroneous, for that and the other reaſons above mentioned, appealed, but the ſentence was affirmed in the delegates.

The promovent then proceeded againſt the bail, not merely for the ſum for which they had engaged by their ſtipulation, but for a much larger ſum, viz. the whole ſum decreed, and the bail having come in to ſhew cauſe why they ſhould not pay a larger ſum than that mentioned in the ſtipulation, the motion was refuſed, upon which they appealed, which appeal is ſtill depending.

Commiſſion of Adjuncts.

In Pentland *v.* Mallie, the court of delegates had been equally divided. Application was made to the court of chancery for a *commiſſion of adjuncts*. The application being novel in this country, the court deſired it to be argued, which was done with great learning, and I am ſorry that want of room forbids me to inſert the arguments. The court was ſoon ſatisfied that there could be no doubt of the propriety of the application (which applies equally to the court of *admiralty*) but the parties compromiſed.

Commiſſion of Review.

* *Opinion given by a great Engliſh Advocate.*

His majeſty has a power of granting a commiſſion of review after the ſentence of the delegates if he is adviſed ſo to do, but ſuch a grant is mere matter of diſcretion, and by no means *ex debito juſtitiæ*; ſuch grants have been rare at all times, and of latter years have been diſcountenanced to a degree that may be conſidered as amounting to a total extinction of the practice. The laſt caſe, when it was applied for, was in the caſe of Hoogſkarpel, a prize cauſe. The hiſtory and nature of the prerogative of granting commiſſions of review was fully enquired into on that occaſion, and the court (in which Lord Camden preſided), held that ſuch a power was exerciſed by the ſovereigns of countries in which the civil law and canon law were permitted to govern the tribunals either in whole or in part, ſuch a power having taken its riſe in the more corrupt ages of thoſe ſyſtems of juriſprudence.—That this power having been anciently exerciſed in the eccleſiaſtical tribunals of England by the Pope, devolved of courſe to the crown, by virtue of the ſtatutes which transfered the ſupremacy at the time of the reformation, at leaſt that it had been ſo held upon an adjudged caſe where it was brought in queſtion, though, as Lord Camden obſerved upon very unſatisfactory grounds, that would hardly have led to ſuch a judgment in later times againſt the poſitive language of ſtatutes, which declare the ſentence of the delegates to be final; that it was a prerogative not to be countenanced, being the growth of dark and deſpotic times, and tending to introduce matter of favour into the regular adminiſtration of juſtice. Lord Camden added, that he thought it likely that would be the laſt application that ever would be made for a commiſſion of review, at leaſt

* In Evans *v.* Napier.

he would venture to ſay, that ſuch an application would never be ſucceisful *.

Briggs, *v.* Sir Anneſly Stewart and Williams.

This cauſe came on to be heard on the appeal. It was ſtrongly urged again that the bail were made to be ſecurity for a different ſhip, from that for which they proffered to be ſecurity; but the court was unanimouſly of opinion that it lay upon the appellant to ſhew that they were different ſhips, and unleſs ſome ground was laid to excite a ſuſpicion of their diverſity, they would preſume their identity. It was urged on the part of the appellant that the judge below had nothing to amend by, and that to amend the bail bond or ſtipulation by his own ſentence was abſurd, as that ſentence had nothing to warrant it as to the names of the ſhip and captain; to which the reſpondent anſwered, that the inſertion of thoſe names in the ſentence was juſtified and ſupported by the manner in which the original appearance of the appellant's proctor was entered; but this entry was not ſhewn or proved to the court. The appellant's ſtrongeſt arguments were, that they, the bail, in conſequence of this change of names, never could recover *over* againſt the perſons for whoſe ſhip they had given ſecurity, and if they took the ſhip itſelf, they could not ſend her to ſea, becauſe the name under which alone they could legally take her, would differ from her name in the regiſtry. The reſpondents ſaid they had in the conteſt taken her name from the cuſtom-houſe regiſtry. Decreed, *male appellatum.*

Wood *v.* Hannah.

This cauſe, ſince the printing of the former part of the Appendix, has been diſpoſed of. An exception was on the

* See an urgent application for a commiſſion of review in Fearon's caſe, 5 Veſey, Junr. Reports; it was there refuſed. It was ſince granted in Ireland in the caſe of Geiſler *v.* Higginbotham, becauſe parol or viva voce evidence had been admitted after publication.

9th of May, 1799, put in by the Daniſh captain to the juriſdiction of the court of admiralty, ſtating that the veſſel had been on the 20th April, 1798, taken by a French ſhip of war near the coaſt of Norway, beyond the neutral limits, and carried into Chriſtianſand, and there condemned by the decree of a *French vice-admiralty court*, (for ſuch it appeared to be) *authoriſed by the law of Denmark*, and by the law of nations, and allowed by the treaties between France and Denmark, and Denmark and England, and ſtiled the court of the *chancellerie* or *chancery* of the French *conſulage*, for the French Republic at Chriſtianſand*: that the veſſel was under ſaid decree ſet up to public auction by his Daniſh majeſty's city regiſter, and ſold in open market, and there purchaſed bona fide, by the merchants; that ſhe was almoſt entirely rebuilt, and got a Daniſh regiſtry, and then, by a bill of ſale ratified by the Daniſh burgomaſter of the place, was ſent under his command to the port of Belfaſt, where ſhe was ſeized by the promovent in ſaid port; and upon all theſe grounds the party did *except to the juriſdiction of the court of admiralty* in Ireland, *inaſmuch* as the ſale of the ſhip was executed upon the land, and if any wrong was done to promovent in purchaſing ſaid veſſel, it was done upon the land, viz. at Chriſtianſand in the kingdom of Norway, and not upon the high ſeas, nor within the juriſdiction of this court; and even if the ſaid purchaſe could be conſidered as in any wiſe connected with the original capture, the ſaid capture is not within the cognizance of this court, inaſmuch as it hath not any prize commiſſion.

The long vacation approaching, and the impugnant being apprehenſive that the exception might not be diſpoſed of until the next term, *applied* to the court of king's bench for a *prohibition*, which was ſtrenuouſly oppoſed.

* Such a court, however extraordinary, has been permitted, and held in the war of 1761 in Norway, both by Engliſh and French conſuls, and in the preſent war for ſome time in America.

Council againſt the application inſiſted, that this was a prize queſtion triable only by the court of admiralty; that it was in vain to try to ſeparate the queſtion of ſale from the qneſtion of condemnation and of the authority of the court of Norway, ſince the ſale is derived from the condemnation, and the bill of ſale recites the ſentence in Norway; that the queſtion as to the legality of that court, or the propriety of its proceedings, was a queſtion of the law of nations, not properly cognizable by courts of common law.—That a ſale in market overt muſt be perfectly free from fraud, which even though unknown to the buyer would vitiate it.—That the old idea of a prohibition going becauſe it was a contract upon land, in *partibus tranſmarinis*, was done away in Menetone *v.* Gibbons, 3 Term. Rep. That even ſuppoſing this were a mere queſtion as to whoſe property the ſhip was, the admiralty has concurrent juriſdiction, and ſuits for reſtitution have been frequent there, and that any authorities cited to ſupport this application could only be from obſolete and antiquated deciſions.

On the other ſide I argued, *firſt*, that this was a mere queſtion of property, viz. Whether a ſhip belonged to *A.* or *B.* the proper ſubject of an action of trover or replevin, but with which the court of admiralty had no more to do, than with a diſpute about property in a *houſe*, unleſs the name of *ſhip* had ſome magic in it, which always and neceſſarily gave the admiralty juriſdiction, which no perſon would aſſert; e. g. a ſhip might be mortgaged for a law debt not ſpringing from any maritime cauſe, or it might be taken in execution by a ſheriff, and who would think of applying to the court of admiralty in any ſuch caſe? So if ſold from hand to hand, the vendee, to get poſſeſſion of her, would never think of applying to the court of admiralty. We muſt recur to the principles that give that court juriſdiction, there muſt not only be a lien on the ſhip, but that muſt alſo ſpring from ſome maritime cauſe; but neither a covenant totally irrelative to maritime affairs,

although binding a ſhip, nor a quaſi tort by peaceably getting poſſeſſion of a ſhip in ſuch manner as this, would give the admiralty juriſdiction: and ſo is Violet *v.* Blague, Moore, 891, and numerous other caſes.

That even ſuppoſing the admiralty *generally* to have juriſdiction, it was here ouſted by *particular* well known rules. If the libel be for the *ſhip itſelf* being *in a port or haven*, the admiralty juriſdiction is ouſted. See the caſe juſt mentioned of Violet and Blague in Moore, and alſo reported in 2 Croke, 514.

So if the libel be for a matter done on land. particularly in *partibus tranſmarinis*, prohibition lies, ſee Hob. Rep. 11. Bridgeman's caſe, p. 79, Palmer *v* Pope. Cro. Car. 603, Ball *v.* Trelawny, 12 Co. 104 Thomlinſon's caſe, 1 Roll. 528, l. 50; nor was the caſe of Menetone *v.* Gibbons an exception.

So if the libel be for a matter where the original was upon the ſea, but afterwards there is an act upon the land whereby the property is altered, as if goods taken (by pirates even) are ſold on *land* in market overt, and vendee is ſued in the admiralty, prohibition goes, 2 Brownlow, 29, 1 Roll. 531, l. 52; and the effect of altering the property is further ſeen in this, that if a ſhip be taken by enemies at ſea and afterwards retaken, it ſhall be tried by the common law, 2 Brownlow, 11. Weſton's caſe, 4 Inſt. 154.

All theſe circumſtances concur here.

Secondly, if this was not a mere queſtion of property, it was a prize queſtion, and the admiralty of Ireland has no prize juriſdiction, and ſo it was lately determined.

That as to the court not being competent to decide on the legality of the French conſulage court in Denmark, it was not called upon to do ſo; but if it was, and it ſhould be anſwered, that the queſtion of the ſale was inſeparably connected with that of the capture, and brought the latter and

the juriſdiction of the court in Denmark neceſſarily before the court, it did ſo collaterally and incidentally, and the court of king's bench has full authority to judge of the juriſdiction of foreign courts of admiralty, as it doth every day in queſtions of inſurance: that the court of admiralty had no concurrent juriſdiction in ſuch a caſe as this, nor could a ſingle authority be adduced to ſhew it had, or had ever tried ſuch a cauſe; and as to council not producing modern caſes to ſupport their argument, the reaſon was, that in modern times no one had ever thought of ſetting up ſuch a juriſdiction.

That in Sir Leoline Jenkins's Letters, (and no higher authority can be cited as to matters of the admiralty) 2 vol. p. 734, is a caſe of a French privateer taking a Dutch veſſel, and bringing her into the port of Youghal in Ireland, where the high court of admiralty condemned her, and ſhe was ſold; on which occaſion, though that great judge denies the authority of the Iriſh court of admiralty to entertain that cauſe, yet ſays he, "I do not ſee how the purchaſer can be "ouſted of his poſſeſſion, for more than probable the bargain "was made between the buyer and the privateer *upon the* "*land*, and conſequently the cognizance of the validity of it "will be prohibited to the admiralty, and if a verdict at "common law ſhall find the ſale to be a good ſale, the "claimant will be without remedy."

The court granted the prohibition, and that (on account of the very ſpecial circumſtances) upon the laſt day of term.

N. B. I apprehend there can be no doubt that this was a prize queſtion.

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ADDITIONAL OBSERVATIONS.

Upon a reviſal of what has been ſaid, with reſpect to the poſition, that Admiralty proceedings not only are but ought to be always and only *in rem*, conceiving that it may be liable to miſconſtruction, I have thought it neceſſary to add the following obſervations:

I am fully aware that it will be ſaid there has been no contradiction in the exerciſe of the prohibitory controul by the law courts, nor any puzzle ſave what has ariſen from an erroneous view which I have taken of things. That the law courts never did in any inſtance allow the Court of Admiralty to hold plea of perſonal contracts, nor did the latter pretend to any ſuch right. That the Judges of the Common Law uniformly held that the power of the Admiralty was confined to proceedings *in rem*, was only allowed in ſuch caſes from neceſſity, and could not interfere where there was a common law remedy *in perſonam*. That when the ſailor ſues the maſter of a ſhip, he doth not ſue him upon his perſonal contract, but as having the freight or proceeds in his hands, ſo that the ſuit is really againſt thoſe proceeds, *i. e. in rem*, and the maſter

in fact never doth enter into any perſonal contract. That the Admiralty never entertained any other view of the matter, and when it inſiſted that material men and the like could ſue, only meant that they could ſue the ſhip, and proceed *in rem*, and that the only controverſy between the Courts of Common Law and Admiralty hath been, what contracts bound the ſhip, freight, cargo or proceeds, and operated *in rem*, and what not: The Admiralty inſiſting that *all* contracts of the maſter bound the ſhip, which the Courts of Common Law denied. Laſtly, that proceeding on a perſonal contract in the Admiralty is unneceſſary and uſeleſs, there being a remedy at Common Law.

To this I reply, that though the ſtatement above made may, if true, clearly ſolve all difficulties, it doth not ſeem conſonant to the fact; for how can it be ſaid that the contract of the maſter on which he is ſued by the ſailor is not a perſonal one? It certainly is not an abſolute one to pay at all events, *e. g.* if the ſhip be loſt; it is conditional, but the condition is this, if the ſhip or the freight be not forthcoming, if the ſhip be ſent away, and I have paid over or waſted the freight, (or to ſpeak more properly the value of the freight), I will be anſwerable to you, and you may proceed againſt my perſon and arreſt it, (if not directly, at leaſt by forcing me to enter into a ſtipulation which ſhall give juriſdiction to the court), ſo that its power of arreſting at leaſt, if not of proceeding, ſhall be founded upon this perſonal engagement; ſurely

when

when the captain is thus ſued, it requires ſome ſubtlety of thought at leaſt to conſider it as a proceeding *in rem*. If this be not the caſe, here is one inſtance at leaſt, of juriſdiction *derived* from a conditional perſonal contract by the Admiralty and not prohibited by the Common Law. When a ſalvor ſues the owners for ſalvage without having firſt had recourſe to the ſhip, as hath been done*, it ſeems to be another inſtance of juriſdiction derived from the *implied* contract of the owners to pay the *quantum meruit* of the ſalvagers. And as to the query, what can be the uſe of the proceedings in the Admiralty, except to attach the *rem*? the anſwer is, becauſe the proceedings are ſhorter, more ſummary and expeditious than at law, and particularly in the caſe of ſailors are *velo levato*.

Even ſuppoſing that the Admiralty ought only to proceed *in rem*, the other queſtion remains; would it not be more uſeful for the public, that the Admiralty doctrine, that all contracts of the maſter for the ſervice of the ſhip bind the ſhip, (though I much doubt whether any ſuch rule be found in the Civil Law as has been aſſerted by ſome Common Law reporters) ſhould univerſally prevail, than that it ſhould admit of exceptions founded in no real or clear diſtinction? and may it not be queſtioned whether any miſchief would ariſe if the rule were extended to the contracts of the owners, made for the uſe and neceſſaries of the ſhip?

* See Robinſon's Reports, vol. 3. part 6. page 217. Caſe